

***United States Court of Appeals
for the Second Circuit***



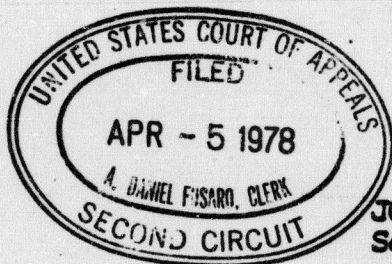
APPENDIX

77-6166

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARROLL BARNETT, HAROLD MCBRINE,
on behalf of themselves and all
others similarly situated,

Plaintiff-Appellees



v.

JOSEPH A. CALIFANO, JR.,
Secretary of Health, Education,
and Welfare,

Defendant-Appellant

BPI
15

JOINT APPENDIX

ZANDER B. RUBIN
Vermont Legal Aid, Inc.
55 Main Street
St. Johnsbury, Vermont 05819
Attorney for Appellees

BARBARA ALLEN BABCOCK
Assistant United States
Attorney General

GEORGE W. F. COOK
United States Attorney

RANDOLPH W. GAINES
Chief of Litigation

ROBERT VARNUM
Attorney
Office of the General Counsel
Social Security Division
Department of Health,
Education, and Welfare
6401 Security Boulevard
Baltimore, Maryland 21235
Telephone: (301) 597-2570

Attorneys for Appellant.

PAGINATION AS IN ORIGINAL COPY

INDEX

	<u>PAGE</u>
Docket Entries	001
Index of Record.	007
Plaintiffs' Summons and Complaint (Filed November 13, 1974).	012
Plaintiffs' Amended Complaint (Filed November 19, 1974).	025
Opinion and Order (Court has Jurisdiction Under 28 U.S.C. 1361) (May 6, 1975).	027
Defendant's Answers to Plaintiffs' Interrogatories (Filed July 2, 1975)	033
Defendant's Answers to Plaintiffs' Interrogatories (Filed November 13, 1975).	049
Opinion and Order (Class Certified) (January 13, 1976)	057
Defendant's Supplemental Responses to Plaintiffs' Interrogatories dated January 27, 1975 (Filed March 1, 1976).	062
Defendant's Supplemental Responses to Plaintiffs' Interrogatories dated September 15, 1975 (Filed March 1, 1976).	075
Stipulation of Facts (Filed July 10, 1976).	078
Affidavit of Jan J. Sagett dated July 15, 1976 (Attached to Memorandum in Support of Defendant's Motion for Summary Judgment) (Filed August 23, 1976).	090
Defendant's Supplemental Response to Plaintiffs' Interrogatories dated January 27, 1975 (Filed September 28, 1976)	095
Affidavit of Jan J. Sagett dated January 17, 1977 (Filed January 27, 1977)	098

PAGE

Opinion and Order (January 22 (sic) [February 22,] 1977)	100
Judgment (April 14, 1977)	113
Opinion and Order (Denying Defendant's Motion to Alter or Amend; Finding Jurisdiction Under 42 U.S.C. 405(g); Granting Partial Stay) (July 11, 1977)	117
Order (Vacating Partial Stay) (August 30, 1977)	129

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Civ. 74-270
 Jury demand date:

CONFIRM

Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
Sarah Sargent, Intervenor Harvey J. LaVigne, Intervening Pltf. Hattie McGivern, Intervening pltf. Raymond Granier, Intervening pltf. Severly Baird, Intervening pltf.	For plaintiff: & proposed Intervenor Zander B. Rubin, Esq. Vermont Legal Aid, Inc. 56 Railroad St. St. Johnsbury, VT
CARROLL BARNETT; HAROLD McBRINE; on behalf of themselves and all others similarly situated; vs.	Stephen W. Kimbell, Esq. VLA. POB 562 Burlington, VT for proposed Intervenor Greta Vincent LaVigne
CASPAR WEINBERGER, Secretary of the Department of Health, Education and Welfare.	
	- For defendant: U. S. Attorney
	Jerome F. O'Neill, Esq. Assistant U. S. Attorney P. O. Box 973 Federal Building Burlington, VT 05402
	Hon. Barbara A. Bahcock Assistant Attorney General ATT: Michael Hertz Washington, D. C. 20530

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
5 mailed DEC 5 1974	Clerk					
6 mailed MAY 5 1977	Marshal					
in of Action:	Docket fee					
ofial Security Act	Witness fees					
USC §1383(c)(2)						
ion arose at: 2	Depositions					

DATE	PROCEEDINGS	Date of Judgment
1974		
Nov. 13	Filed Plaintiff Carol Barnett's Motion to Proceed in Forma Pauperis.	1.
" "	" Plaintiff Harold McBaine's Motion to Proceed in Forma Pauperis.	2.
" "	Order granting Pltfs' application to file in forma pauperis.	3.
" "	Copy mailed to attorneys.	4.
" "	Verified Complaint.	5.
" "	Issued Summons.	6.
" 19	Filed Government's Opposition to Motion for Temporary Restraining Order.	7.
" "	Filed Plaintiffs' Amended Complaint.	8.
" "	Filed Plaintiffs' Memorandum in support of TRO.	9.
" "	In Chambers before Judge Coffrin. Zander B. Rubin, Esq., for Plaintiffs. Jerome F. O'Neill, Ass't. U. S. Attorney for Government.	
" "	David Kalib, Ass't. Attorney General, appeared for Plaintiffs amicus, and moves to consolidate the case which he filed today with the Clerk, with this case. (Civ. 74-275)	
" "	Hearing on Plaintiffs' Application for a TRO.	
" "	Statements made to Court by Mr. Rubin in support of his motion.	
" "	Court makes inquiry of Mr. Kalib and Mr. O'Neill.	
" "	Taken under advisement.	
" 25	Filed Summons returned served.	10.
" 29	Filed Pltff. Barnett's withdrawal of application for TRO.	11.
1975		
Jan. 17	Filed Motion of Maurice Washburn to Intervene as Party Pltff.	12.
" "	" Memorandum in support of Motion to Intervene.	13.
" "	" Govt's Motion to Dismiss.	14.
" "	" Govt's Memorandum of Points and Authorities in Support of Motion to Dismiss.	15.
" 28	Filed Plaintiffs Interrogatories.	16.
Jan. 28	Filed plaintiffs' request for additional time to file memorandum re defendant's motion to dismiss.	17.
" 28	Upon consideration of plaintiffs' request for additional time to and including February 7, 1975, in which to file opposing memorandum to defendant's motion to dismiss, it is	18.
" "	Ordered: in accordance with Rule 6(b) FRCP, said motion is granted. Copy mailed to attys.	19.
Feb. 5	Filed motion of Walter Chapin to intervene as party plaintiff.	20.
" "	" memorandum in support of motion to intervene.	21.
" 6	Filed Motion of Calvin Bassett to Intervene as party plaintiff.	22.
" 11	Filed Pltffs' Memorandum in Opposition to Motion to Dismiss.	23.
Mar. 12	" Pltfs' Motion for Class Certification & Memorandum in support thereof.	24.
" 14	" Motion of Raymond Grenier to Intervene as Party Plaintiff.	25.
" "	" Memorandum in support of motion to intervene by R. Grenier.	26.
" 18	Filed Motion of Greta Vincent to Intervene as Party Plaintiff, AND memorandum.	27.
" 24	Filed Government's Opposition to plaintiffs' motion for class certification and memorandum of points and authorities.	28.
" "	Filed defendant's further memorandum in support of motion to dismiss and in opposition to intervention.	29.
" 24	In Chambers before Judge Coffrin. Zander B. Rubin, Esq. and Stephen Kimbell, Esq. for Plaintiffs. Jerome O'Neill, Ass't U. S. Atty for Government.	
" "	Hearing on motions to intervene; Plaintiffs' motion for class certification and on Government's motion to dismiss.	

DATE	PROCEEDINGS	Date of Judgment
1975		
Mar. 24	Statements made to Court by Mr. Rubin, Mr. Kimbell and Mr. O'Neill.	
" "	Taken under Advisement.	
" 27	Filed Pltfs' Supplemental Memorandum in opposition to Motion to Dismiss.	26
" "	" Motion of Hattie McGivern to Intervene as Party Pltf.	27
" "	" Memorandum in support of Motion to Intervene.	28
Apr. 9	" Pltfs' Supplemental Memorandum in opposition to Motion to Dismiss.	2
" 11	Filed plaintiffs' supplemental memorandum in opposition to motion to dismiss (continued - part 2)	30.
May 6	" Opinion and Order -- Court has jurisdiction; Deft's Motion to Dismiss, which is predicated on lack of jurisdiction is hereby denied; Motion to Intervene of Raymond Grenier and Hattie McGivern granted; Decision reserved on Motion for class action certification; Decision reserved on Deft's Motion to Dismiss for Mootness until hearing held. Mailed copy to attys.	31.
" "	" Complaint of Intervening Pltf. Raymond Grenier.	32.
July 2	Filed Defendant's Answers to Plaintiff's Interrogatories.	33.
" 9	" Stipulation for the purpose of clarifying the definition of the word "schedule".	34.
" 10	" Motion of Beverly Baird to Intervene as Party Pltf.	35.
" "	" Memorandum in support of Motion to Intervene.	36.
" "	" Complaint of Intervening Pltf. Beverly Baird.	37.
" 16	Filed Supplemental Memorandum in Support of Motion for Class Certification.	38.
Sept. 5	Filed Plaintiff's Supplemental Memorandum in Support of Motion for Class Certification (Part 2)	39.
" 16	" Government's Motion to Amend Order pursuant to Rule 60(b)(6) due to lack of jurisdiction and Supplemental Memorandum in opposition to class certification.	40.
" "	" Plaintiffs' Interrogatories.	41.
" 16	At the Call of the Calendar before Judge Coffrin, it was Ordered: that this case be passed.	
" 26	Filed Motion of Harvey J. LaVigne to Intervene as Party Pltf.	42.
" "	" Memorandum in support of Motion to Intervene.	43.
" "	" Complaint of Intervening Pltf. Harvey J. LaVigne.	44.
Oct. 2	Filed Amendment to Paper No. 40.	45.
" 14	" Pltf's Memorandum opposing Motion to Amend Order and in support of Jurisdiction and Class Certification.	46.
Nov. 13	" Deft's Answers to Pltfs' Interrogatories.	47.
" 14	" Deft's Memorandum in reply to Pltfs' Memorandum in opposition to Deft's Motion to Amend Order and in opposition to class certification and Memorandum of Points and Authorities.	48.
Dec. 17	Filed Motion of Sarah Sargent to Intervene as Party Plaintiff.	49.
" "	" Memorandum in Support of Motion To Intervene.	50.
" "	" Complaint of Intervening Plaintiff Sarah Sargent.	51.
1976		
Jan. 5	In Chambers before Judge Coffrin, upon consideration of motions to intervene of Sarah Sargent and Harvey J. LaVigne, it is Ordered: Motions granted. Zander B. Rubin, Esq. and Stephen W. Kimbell, Esq. for plaintiffs; Jerome O'Neill, Esq. for Government.	
" "	Upon consideration of motion to intervene of Beverly Baird, it is Ordered: Motion denied.	
" "	Hearing on Government's motion to amend order due to lack of	

DATE 1976	PROCEEDINGS	Date Judge
Jan. 5	jurisdiction and in opposition to class certification.	
" "	Statements made to Court by Mr. O'Neill and by Mr. Rubin.	
" "	Taken under advisement.	
" 13	Filed Opinion and Order--The Court is satisfied that all the requirements of Rule 23 have been met, and accordingly certifies plaintiffs' class to consist of all present and future applicants for SSI disability benefits whose initial claims are denied on a finding that no disability exists and who subsequently request a reconsideration hearing. Since certification is being effected under Rule 23(b)(2), the Court finds in its discretion that neither individual notice to all class members nor some alternative type of notice is required in this case. Deft's Motion for Dismissal on grounds of mootness is denied. Mailed copy to attorneys.	
" 22	" Notice of Deposition of Robert Hermann, Adm. Law Judge and V. Paul McGinn, Hearing Examiner. (pltf's)	
" "	" Pltf's Notice of Deposition of Raymond Sinibaldi.	
" 29	Filed Plaintiff's Request to Supplement Response to Interrogatories.	
Feb. 13	Filed Plaintiff's Notice of Deposition.	
March 1	Filed Defendant's Supplemental Responses to Plaintiffs' Interrogatories dated September 15, 1975.	
" "	" Defendant's Supplemental responses to Plaintiffs' Interrogatories dated January 27, 1975.	
" 3	Filed Deposition of Raymond C. Sinibaldi.	
May 24	" Deposition of Robert L. Hermann and Vincent Paul McGinn.	
July 1	Filed Stipulation of Facts by both parties.	
" 14	" Pltf's Motion for Summary Judgment.	
" "	" Pltf's Memorandum in support of Motion for Summary Judgment.	
Aug. 23	Filed Memorandum in support of defendant's Motion for summary judgment.	
" 25	Filed defendant Mathews' motion for summary judgment.	6
Sept. 1	" Pltfs' Reply Memorandum to Deft's Motion for Summary Judgment.	8
" 28	Filed supplemental response to plaintiffs' interrogatories dated January 27, 1975.	66
Oct. 1	Filed Defendants reply brief.	67
Nov. 12	" Supplemental Memorandum on White V. Mathews.	68
Nov. 23	In Chambers before Judge Coffrin, hearing on plaintiffs' motion and defendant's motion for summary judgment. Zander Rubin, Esq. for plaintiffs; Jerome O'Neill, Esq. for defendant.	69
" 1977	Taken under advisement.	
Jan. 27	Filed Affidavit of Jan J. Sagett.	
Jan. 22	Filed Opinion and Order--Accordingly, within the District of Vermont the defendant, on or before July 1, 1977, shall have reduced the maximum delay between the proper filing of a petition for a hearing before an administrative law judge and the scheduling and holding of such hearing to 120 days, and by December 31, 1977, the defendant shall have further reduced such maximum delay to 90 days. Any applicant who, on or after July 1, 1977 or January 1, 1978 has pending an application concerning which a hearing has not been scheduled and heard within the appropriate maximum times then in effect as hereby established, shall be paid nonrefundable benefits as though favorable action had been	

CIVIL DOCKET CONTINUATION SHEET

FD-50—3-16-75-508-1511

PLAINTIFF		DEFENDANT	DOCKET NO. <u>Civ. 74-27</u>
CARROLL BARNETT; HAROLD McBRINE, et al		CASPAR WEINBERGER	PAGE <u>3</u> OF <u>3</u> PAGES
DATE	NR.	PROCEEDINGS	
<u>1977</u> Jan. 22		(continued) taken on his or her claim. Such benefits shall terminate upon a subsequent unfavorable result at hearing. The maximum time limit in any particular case shall be extended by such periods of delay as are caused directly by a petitioner's own failure to provide essential information for adjudication or are otherwise caused directly by a petitioner. Within 30 days the parties will agree upon and submit to the Court a proposed order suitable to accomplish the purposes of this judgment.	
Apr. 14	71.		
	72.	Filed Judgment requiring the U. S. to provide prompt hearings in supplemental securities income benefit cases. Copy mailed to attorneys.	
Apr. 25	73.	Filed Motion fo Defendant Califano To Alter or Amend Judgment and Memorandum of Points and Authorities.	
May 4	74.	Filed Plaintiffs' Memorandum Opposing Defendant's Motion to Alter or Amend Judgment.	
May 5	75.	Filed Government's motion for a partial stay of judgment and memorandum of points and authorities.	
May 18	76	Filed Plaintiff's Motion for Relief from Judgment Order Regarding Jurisdiction with Memorandum in Support.	
June 14	77.	Filed Defendant Califano's Notice of Appeal. Copy mailed to Zander B. Rubin, Stephen W. Kimbell, Jerome O'Neill, Asst. U.S. Attorney, Judge Coffrin, Court Reporter (F.C.), and Clerk, U.S. Court of Appeals for the Second Circuit;; also to Joyce Maranville and Herman J. Vesper, Court Reporters.	
" 15		Mailed appeal forms to Jerry O'Neill, Esq.	
July 5		In open Court before Judge Coffrin, hearing on defendant's motions to alter or amend judgment and for a partial stay of judgement. Zander Rubin, Esq. and Stephen Kimbell, Esq. for plaintiffs; John Hughes, Esq. for Government.	
" "		Mr. Hughes states that Government will rely on the memorandum.	
" "		Statements made to Court by Mr. Rubin.	
" "		Government has until the end of this week(7-8-77) to file additional memorandum.	
July 8	78	Filed Defendant's memorandum in response to plaintiffs' motion for relief from judgment order regarding jurisdiction	
July 11	79	Filed Opinion and Order--that plaintiff's motion regarding the addition of 42 U.S.C. § 405 (g) as a basis for jurisdiction is granted; defendant's motion to alter or amend the judgment is denied; and defendant's motion for a partial stay of judgment pending disposition on appeal is granted. The judgment order in this matter will be stayed pending disposition on appeal only insofar as it requires the payment of nonrefundable disability benefits to those who do not receive timely administrative hearings under the Court's prior order. Mailed copies to attorneys.	

005

CIVIL DOCKET CONTINUATION SHEET

FD-203-5-14-75-500-100

PLAINTIFF		DEFENDANT	DOCKET NO. <u>74-2</u>
			PAGE <u> </u> OF <u> </u> PAGES
DATE	NR.	PROCEEDINGS	
1977 Aug 2	80	Filed Plaintiffs' motion to vacate partial stay of judgment order.	
" "	81	Filed memorandum in support of motion to vacate partial stay of judgment order.	
" 26	82	Filed Govt's Opposition to Pltfs' Motion to Vacate Stay of Judgment Order and Memorandum of Points and Authorities.	
" 29		In Chambers before Judge Coffrin (JM). Zander Rubin, Esq. for Pltfs John Hughes, Esq. for Deft.	
" "		Hearing on Pltfs' Motion to Vacate Partial Stay of Judgment Order.	
" "		Statements made to Court by Mr. Rubin and by Mr. Hughes.	
" "		Taken under advisement.	
Aug.30	83.	Filed Order -- plaintiffs' motion to vacate the partial stay of the judgment order be, and the same hereby is, granted and said stay is vacated with respect to the payment of disability benefits to those who do not receive timely administrative hearings under the Court's prior order except that such part of the judgment order that made the payment of such benefits "nonrefundable" shall continue to be stayed pending disposition of this matter on appeal. Copy mailed to attorneys.	
Sept.7	84.	Filed Government's Notice of Appeal. Mailed copy to Judge Coffrin, A. Daniel Fusaro, Vt. Legal Aid, Inc., U. S. Attorney, Mr. Hertz. (Mrs. Isham is making arrangements re transcript).	
" 12		Mailed copy of docket entries to Hon. A. Daniel Fusaro, Clerk, U.S. Court of Appeals. Mailed form letter of Jerome F. O'Neill, Esq.	
Oct. 12		entire record on appeal to Clerk, U. S. Court of Appeals for the Second Circuit. Attorneys notified.	
" 14	85	Filed Scheduling Order--Record on appeal to be filed on or before Oct. 21, 1977. Mailed copy to attorneys.	
Nov. 1	86 ✓	Stipulation for entry of Voluntary Dismissal without Prejudice re Notice of appeal filed June 14, 1977.	
" 3		Mailed First Supplemental on Appeal to Clerk, U. S. Court of Appeals for the Second Circuit. Attorneys notified.	

006

COPY

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Carroll Barnett, Harold McBrine,
on behalf of themselves and all
others similarly situated;
Raymond Grenier, Hattie McGivern,
Harvey J. LaVigne and Sarah
Sargent, Intervenors

vs.

Caspar Weinberger, Secretary of
the Department of Health, Educa-
tion and Welfare

Civil Action

No. 74-270

INDEX

Document No.

Certified copy of docket entries.	A
Pltf. Barnett's motion to proceed in forma pauperis.	1
Pltf. McBrine's motion to proceed in forma pauperis.	2
Order.	3
Verified Complaint.	4
Govt's opposition to TRO.	5
Pltfs' Amended Complaint.	6
Pltfs' Memorandum in support of TRO.	7
Summons.	8
Pltf. Barnett's withdrawal of application for TRO.	9
Motion of Maurice Washburn to intervene.	10
Memorandum in support of motion to intervene.	11
Govt's Motion to Dismiss.	12
Govt's Memorandum in support.	13
Pltfs' Interrogatories.	14
Pltf's request for additional time.	15
Motion of Walter Chapin to intervene.	16
Memorandum in support of motion to intervene.	17
Motion of Calvin Bassett to intervene.	18
Pltfs' Memorandum in opposition to motion to dismiss.	19
Pltfs' Motion for class certification and memo.	20

Motion of Raymond Grenier to intervene.	21
Memorandum in support of motion to intervene.	22
Motion of Greta Vincent to intervene.	23
Govt's opposition to Pltfs' motion for class certification, with memorandum.	24
Govt's further memorandum in support of motion to dismiss.	25
Pltfs' supplemental memorandum in opposition to motion to dismiss.	26
Motion of Hattie McGivern to intervene.	27
Memorandum in support of motion to intervene.	28
Pltfs' supplemental memorandum in opposition to motion to dismiss.	29
Pltfs' supplemental memorandum in opposition to motion to dismiss (part 2).	30
Opinion and Order.	31
Complaint of Raymond Grenier, intervenor.	32
Deft's Answers to Pltfs' interrogatories.	33
Stipulation re clarification of "schedule".	34
Motion of Beverly Baird to intervene.	35
Memorandum in support of motion to intervene.	36
Complaint of Beverly Baird, intervenor.	37
Pltfs' supplemental memorandum in support of motion for class certification.	38
Pltfs' supplemental memorandum in support of motion for class certification (part 2)	39
Govt's motion to amend order and memorandum.	40
Pltfs' Interrogatories.	41
Motion of Harvey J. LaVigne to intervene.	42
Memorandum in support of motion to intervene.	43
Complaint of Harvey J. LaVigne, intervenor.	44
Amendment to P-40.	45
Pltfs' Memorandum opposition motion to amend order.	46
Deft's answers to interrogatories.	47
Deft's memorandum.	48
Motion of Sarah Sargent to intervene.	49
Memorandum in support of motion to intervene.	50
Complaint of Sarah Sargent, intervenor.	51

Opinion and Order.	52
Notice of Deposition by Pltfs.	53
Notice of Deposition by Pltfs.	54
Pltfs' Request to supplement response to interrogatories.	55
Pltfs' Notice of Deposition.	56
Deft's Supplemental responses to pltfs' interrogatories.	57
Deft's Supplemental responses to Pltfs' interrogatories.	58
Deposition of Raymond C. Sinibaldi.	59
Deposition of Robert L. Hermann and Vincent Paul McGinn.	60
Stipulation of facts.	61
Pltfs' motion for summary judgment.	62
Memorandum in support of motion for summary judgment.	63
Memorandum in support of deft's motion for summary judgment.	64
Deft's motion for summary judgment.	65
Pltfs' Reply memorandum to deft's motion for summary judgment.	66
Deft's supplemental response to interrogatories.	67
Deft's reply brief.	68
Supplemental memorandum on <u>White v. Mathews</u>	69
Affidavit of Jan J. Sagett.	70
Opinion and Order.	71
Judgment.	72
Deft's motion to alter or amend judgment and memo.	73
Pltfs' memorandum opposition deft's motion.	74
Govt's motion for partial stay of judgment and memo.	75
Pltfs' motion for relief from judgment order.	76
Govt's notice of appeal.	77
Deft's memorandum in response to pltfs' motion for relief from judgment order.	78
Opinion and Order.	79
Pltfs' motion to vacate partial stay of judgment.	80
Memorandum in support of motion to vacate.	81
Govt's opposition to pltfs' motion to vacate.	82

Order.

83

Govt's Notice of Appeal.

84

Clerk's Certificate.

B

COPY

UNITED STATES DISTRICT COURT

FOR THE
DISTRICT OF VERMONT

Carroll Barnett, Harold McBrine,)
on behalf of themselves and all)
others similarly situated;)
Raymond Grenier, Hattie McGivern,)
Harvey J. LaVigne and Sarah)
Sargent, Intervenors)

Civil Action

No. 74-270

vs.)

Caspar Weinberger, Secretary of)
the Department of Health, Educa-)
tion and Welfare)

FIRST SUPPLEMENTAL INDEX

Document No

Scheduling Order dated 10/11/77.	85
Stipulation for Voluntary Dismissal without Prejudice.	86
Clerk's Certificate.	

4

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

CARROLL BARNETT; HAROLD
MC BRINE; on behalf of
themselves and all others
similarly situated,
Plaintiffs

Civil Action No. 74-270

v.

CASPAR WHITTURGER,
Secretary of the Depart-
ment of Health, Education
and Welfare,
Defendant

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon
Zander B. Pubin, Vermont Legal Aid, Inc., plaintiffs' attorneys,
whose address is 56 Railroad Street, St. Johnsbury, Vermont,
an answer to the complaint which is herewith served upon you,
within 20 days after service of this summons upon you, exclu-
sive of the day of service. If you fail to do so, judgment by
default will be taken against you for the relief demanded in
the complaint.

/s/ EDWARD J. TRUDELL
Clerk of Court

Dated: November 13, 1974
Burlington, Vermont

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

CARROLL BARNETT; HAROLD
MC BRINE, on behalf of
themselves and all others
similarly situated,
Plaintiffs

v.

CASPAR WEINBERGER,
Secretary of the Depart-
ment of Health, Education
and Welfare,
Defendant

Civil Action No. 74-270

VERIFIED COMPLAINT

I. PRELIMINARY STATEMENT

1. This is a civil class action seeking declaratory and injunctive relief to compel agency action wrongfully withheld or delayed in regard to scheduling hearings for applicants for disability benefits filed pursuant to 42 USC §1331, et seq. (Supplemental Security Income), whose initial applications were denied. Plaintiffs seeking declaratory relief that the actions of the Defendant violates the due process clause of the Fourteenth Amendment to the U.S. Constitution, the Social Security Act, 42 USC §1383(c)(2), and the Administrative Procedure Act, 5 USC §555(b). Plaintiffs further seek injunctive relief restraining Defendant from continuing his present course of conduct in scheduling hearings, and seek an order providing for the scheduling of hearings for themselves and all members of the class, within a reasonable time period after application therefor.

(RETYPE COPY)

II. JURISDICTION

2. This court has jurisdiction under 28 USC §1361, as this is an action in the nature of mandamus to compel an officer or employee of the Department of Health, Education and Welfare to perform a duty owed to Plaintiff and the class they represent.

3. This Court also has jurisdiction pursuant to the Administrative Procedure Act, 5 USC §701, et seq, as this is an action to compel agency action withheld or unreasonably delayed.

4. Declaratory judgments are authorized under 28 USC §2201-2202.

III. PARTIES

5. Carroll Barnett is a citizen of the United States, is 61 years of age and is a resident of East Barnet, Vermont. He is married and has no minor children.

6. Harold McBaine is a citizen of the United States, is 55 years of age and is a resident of St. Johnsbury, Vermont. He is married and has no minor children.

7. Caspar Weinberger is the Secretary of the U. S. Department of Health, Education and Welfare. Pursuant to 42 USC §1382, et seq. he is responsible for the administration of the national program to provide supplemental security income to disabled individuals.

IV. CLASS ACTION ALLEGATIONS

8. Plaintiffs bring this action pursuant to Rule 23 (b) (2) of the F.R.C.P. on behalf of themselves and all other persons similarly situated. The class is composed of all

present and future applicants for SSI disability benefits, whose initial claims are denied on a finding that no disability exists, and who request a hearing on that issue, and are thus subjected to the delay in scheduling hearings that is created by Defendant's course of conduct in this area.

9. Plaintiffs do not know the precise number of persons in this class, as that information is within the Defendant's knowledge, and the class is a fluid one, but, upon information and belief it is alleged that the size of the class is in excess of 100 and thus joinder is impractical.

10. There are questions of law and fact common to the plaintiffs and all other members of the class, i.e. whether the delay in scheduling hearings on SSI disability claims violates the due process clause of the Fourteenth Amendment, the Social Security Act, or the Administrative Procedure Act. Upon information and belief it is alleged that a list is compiled by order of date of filing for all people requesting hearings and thus all members of the class meet the same delay in the scheduling of hearings.

11. The claims of the named plaintiffs are typical of the claims of the class, and thus the named plaintiffs will adequately protect the interests of the class.

12. Moreover, the defendant has acted and/or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

V. STATEMENT OF FACTS

13. The Federal Supplemental Security Income program for aged, blind and disabled persons was established by Congress

to federalize the state public assistance programs that were providing aid to the aged, blind and disabled. The statutory scheme for SSI is provided at 42 USC §1381, et seq, and the program took effect January 1, 1974.

14. Under this program, benefits are provided to individuals who are found to be disabled, and who have income and resources below specified levels, as defined in the statute and implementing regulations.

15. The statute and implementing regulations provide the procedure governing the application for benefits, and appeals process if benefits are initially denied.

16. The Defendant has adopted regulations governing the application for SSI benefits, and the regulations provide that after an application is filed, there is an initial determination of eligibility, to be made, 20 CFR §416.1401, et seq, and that a party who is dissatisfied with an initial determination may request reconsideration, 20 CFR §416.1403, and that if a party is dissatisfied with a reconsideration, he may request a hearing, within 30 days after receiving reconsideration 20 CFR §416.1425, 1426. The regulations do not provide any time limit within which a hearing must be scheduled, but do provide that a decision must be issued not later than 90 days after the request for a hearing, except in cases involving the question of the existence of a disability, or unless there are delays attributable to the party or not attributable to the Secretary, i.e. acts of God. 20 CFR §416.1455.

17. The statute provides:

"The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility for benefits ..." 42 USC §1383(c) (1)

and:

"Determinations on the basis of such hearing, except to the extent that the matter in disagreement involves the existence of a disability ... shall be made within ninety days after the individual requests the hearing ..."

42 USC §1383(c) (2)

18. Carroll Barnett filed an initial claim for SSI disability benefits in February, 1974, and his attorney was informed orally, in April, 1974 that his application had been denied.

19. No written notice of this initial determination was provided at that time, but Mr. Barnett requested reconsideration on or about April 29, 1974, and on May 29, 1974 received a Notice of Reconsideration which affirmed the initial denial (see copy attached to this Complaint).

20. On or about June 21, 1974 Mr. Barnett requested a hearing on the denial of his disability claim (see copy attached), but no hearing has been scheduled to date. His attorney has been informed by an employee of the Defendant at the Bureau of Hearings and Appeals in Manchester, New Hampshire, that a hearing probably will be scheduled within the next 2 months, but no definite commitment could be given.

21. Mr. Barnett meets all of the eligibility requirements of the SSI program at present (need, resources) except the disability standard, and he feels that he meets that standard also.

22. Mr. Barnett's sole source of income for himself and his wife at present are General Assistance payments received from the Vermont Department of Social Welfare, in the amount of \$8.00 per week for food and personal needs. Additionally, General Assistance has paid for utility bills, and shelter payments, and Mr. Barnett gets \$84.00 worth of food stamps per month, at the cost of \$12.00 per month. Mr. Barnett's wife had been running a coffee shop which added a small amount of income to the family, but this business has recently ended as it became unprofitable. General Assistance payments are limited to certain categories of needs, such as food, and shelter, and even for food, the payment is reduced to 20% below the Department of Social Welfare's standard of need, which itself is quite low. Mr. Barnett has various bills which he cannot pay at present, and for which General Assistance is not available, and he has been continually threatened with lawsuits. Thus, the failure to grant him a hearing on his claim for SSI benefits is working continuing irreparable injury on Mr. Barnett.

23. Harold McBrine filed an initial claim for SSI disability benefits on May 9, 1974, and an initial determination finding him not disabled was rendered on June 24, 1974.

24. Mr. McBrine requested reconsideration on or about July 16, 1974 and reconsideration was denied on July 30, 1974.

25. Mr. McBrine requested a hearing on or about August 18, 1974 on the denial of his disability claim, but no hearing has been scheduled to date. His attorney has been informed by an employee of the Defendant at the Bureau of Hearings and Appeals in Manchester, New Hampshire, that a hearing probably will be scheduled within the next 2 months, but no definite commitment could be given.

26. Mr. McBrine meets all of the eligibility requirements of the SSI program at present (need, resources) except the disability standard, and he feels that he meets that standard also.

27. Mr. McBrine's sole source of income for himself and his wife is a disability pension from the Veteran's Administration in the amount of \$148.60 per month, and General Assistance that he receives periodically from the Vermont Department of Social Welfare for food. Thus, the failure to grant him a hearing on his claim for SSI benefits is working continuing irreparable injury on him, as his present income is insufficient to meet his basic needs.

28. Upon information and belief it is alleged that under the current practice of the Defendant, any member of this class who requests a hearing will encounter a delay of approximately six (6) Months, or more before that hearing is scheduled.

29. The applicants in this class are, by definition, financially needy and are seeking SSI disability benefits to provide them with a basic subsistence income and thus are being irreparably injured by the delay in scheduling hearings for them.

FIRST CAUSE OF ACTION

30. The long delay between the requests for hearings and the scheduling of the same violates the due process clause of the Fourteenth Amendment to the U.S. Constitution.

SECOND CAUSE OF ACTION

31. Title 5 USC §555(b) provides

"With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."

Title 5 USC §706(I) provides that the district court shall:

"... compel agency action unlawfully withheld or unreasonably delayed ..."

32. By failing to schedule hearings within a reasonable time for plaintiffs and the class they represent, the Defendant is violating the provision of 5 USC §555(b), and is unlawfully and unreasonably delaying agency action.

THIRD CAUSE OF ACTION

33. The Social Security Act, 42 USC §1383(c) (2) gives the Defendant 90 days after requests for hearings to make determinations on the basis of such hearings, but exempts disability claims from this mandate.

34. Plaintiffs recognize that determinations in disability cases may be more complex than in other cases and thus the rationale for excluding them from the 90 day limit on determinations, but plaintiffs are merely seeking the scheduling of their hearings.

35. Since there is no reason why disability hearings shouldn't be scheduled within the same time span as other hearings, and since 42 USC §1383(c) (2), by implication, requires that hearings be scheduled sometime before 90 days have elapsed after the request for a hearing, the Defendant is violating the Social Security Act by not scheduling hearings within this time span.

WHEREFORE, plaintiffs pray that this Court:

1. Enter an order granting plaintiffs' request that the action be treated as a class action as prescribed by Rule 23;
2. Grant a temporary restraining order restraining Defendant Weinberger, his agents, and employees, from continuing to delay Carroll Barnett's request that a hearing be scheduled on his SSI claim, and order that said hearing be scheduled immediately;
3. Grant a preliminary and permanent injunction enjoining Defendant Weinberger, his agents and employees from delaying the scheduling of hearings for plaintiffs and the class they represent, and ordering that all such hearings be scheduled within a reasonable time after the request therefor, as this Court may determine to be consistent with the due process clause of the Fourteenth Amendment, the Social Security Act, and the Administrative Procedure Act;
4. Declare that Defendant's actions in delaying the scheduling of hearings for plaintiffs and the class they represent violate the due process clause of the Fourteenth Amendment, the Social Security Act, and the Administrative Procedure Act;
5. Award such other relief as may appear to the court to be equitable, just and proper.

Dated at St. Johnsbury, Vermont, this ____ day of November, 1974.

(signature)
Zander B. Rubin, Esq.

(signature)
John Billings, Esq.

Attorneys for Plaintiffs

WHEREFORE, plaintiffs pray that this Court:

1. Enter an order granting plaintiffs' request that the action be treated as a class action as described by Rule 23;

2. Grant a temporary restraining order restraining Defendant Weinberger, his agents, and employees, from continuing to delay Carroll Barnett's request that a hearing be scheduled on his SSI claim, and order that said hearing be scheduled immediately;

3. Grant a preliminary and permanent injunction enjoining Defendant Weinberger, his agents and employees from delaying the scheduling of hearings for plaintiffs and the class they represent, and ordering that all such hearings be scheduled within a reasonable time after the request therefor, as this Court may determine to be consistent with the due process clause of the Fourteenth Amendment, the Social Security Act, and the Administrative Procedure Act;

4. Declare that Defendant's actions in delaying the scheduling of hearings for plaintiffs and the class they represent violate the due process clause of the Fourteenth Amendment, the Social Security Act, and the Administrative Procedure Act;

5. Award such other relief as may appear to the court to be equitable, just and proper.

Dated at St. Johnsbury, Vermont, this 12 day of November, 1974.

[Signature]
Zander S. Rubin, Esq.

[Signature]
John Billings, Esq.

Attorneys for Plaintiffs

021A

VERIFICATION

CARROLL BARNETT and HAROLD MC [unclear], being duly sworn
depose and say that they have read the foregoing Complaint and
that the allegations of fact pertaining to each deponent are
true of his own knowledge and belief.

1st Carroll Barnett
CARROLL BARNETT

1st Harold Mc [unclear]
HAROLD MC [unclear]

Subscribed and sworn to before me this 12
November, 1974.

1st [unclear] [unclear]
Notary Public

Supplemental Security Income Notice of Reconsideration

From: Department of Health, Education, and Welfare
Social Security Administration

Date:

Claim Number: 020-05-2223

MAY 20 1974

Reconsideration Filed: 4/29/74

Category: Disabled/Blind

Mr. Carroll Barnett
Box 87
Barnet, Vermont 05821

As you requested, your claim for supplemental security income checks, has been thoroughly reexamined.

To get supplemental security income disability checks, you must be unable to do any substantial gainful work because of a medical condition which has lasted or will last at least 12 months in a row. Your age, education, training, and past work experience are also considered in this decision.

We have just finished another careful review of your case. We looked again at all your medical records and considered everything you told us about your condition. All of the evidence in your case shows you still do not meet the disability requirements of the law. Because of this, supplemental security income checks cannot be sent to you.

-028

Important: See other side for an explanation of your appeal rights and other information ►

REQUEST FOR HEARING

Take or mail original and all copies to your local Social Security office.

CLAIMANT'S NAME

Correll Barnett

WAGE EARNER'S NAME (Leave blank if same as above)

SOCIAL SECURITY NUMBER

020-05-0000

CLAIM FOR

☒ Entitlement to Disability Benefits (97)

☐ Continuance of Disability Benefits (98)

☐ Other

(Specify type claim)

I disagree with the determination made on the above claim and request a hearing before a hearing examiner of the Bureau of Hearings and Appeals. My reasons for disagreement are:

I am disabled

Check one of the following:

- ☒ I have additional evidence to submit.
(Attach such evidence to this form or forward to the Social Security Office within 10 days.) **will be submitted when**
- ☐ I have no additional evidence to submit. **available**

Check ONLY ONE of the statements below.

- ☒ I wish to appear in person before the hearing examiner.
- ☐ I waive my right to appear and give evidence, and hereby request a decision on the evidence before the hearing examiner.

Signed by: (Either the claimant or representative should sign-Enter addresses for both. If claimant's representative is not an attorney, complete Form SSA-1696)

SIGNATURE OR NAME OF CLAIMANT'S REPRESENTATIVE

John Billings, Jr. Legal Aid

ADDRESS

56 Railroad Street

CITY, STATE, AND ZIP CODE

St. Johnsbury, Vermont 05819

TELEPHONE NUMBER

748-0721

DATE:

June 21, 1974

Claimant should not fill in below this line

CLAIMANT'S SIGNATURE

ADDRESS

East Barnet

CITY, STATE, AND ZIP CODE

Vermont 05821

TELEPHONE NUMBER

633-4926

Is this request filed within 6 months of the reconsideration determination? ☒ Yes ☐ No
If "No" is checked: (1) attach claimant's explanation for delay, (2) attach any pertinent letter, material, or information in the Social Security Office.

ACKNOWLEDGMENT OF REQUEST FOR HEARING

Your request for a hearing was filed on **June 21, 1974** at **Kontopolier, Vermont**
The hearing examiner will notify you of the time and place of the hearing at least 10 days prior to the date which will be set for the hearing.

For the Social Security Administration

By: _____ **Claims Representative**
(Signature) (Title)

11 School Street

(Street Address)

Kontopolier, Vermont

(City)

(State)

05602

(ZIP Code)

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

CARROLL BARNETT; HAROLD
MC BRINE; on behalf of
themselves and all others
similarly situated,
Plaintiffs

v.

CASPAR WEINBERGER,
Secretary of the Depart-
ment of Health, Education
and Welfare,
Defendant

Civil Action No. 74-270

AMENDED COMPLAINT

Now come plaintiffs Carroll Barnett and Harold McBrine,
by their attorneys, Zander B. Rubin, Esq. and Vermont Legal Aid,
Inc., to amend their complaint as a matter of course, pursuant
to Rule 15(a) F.R.C.P., as follows:

That their prayer for relief be amended so that para-
graphs 2 and 3 read as follow:

2. Grant a temporary restraining order restraining
Defendant Weinberger, his agents, and employees, from continuing
to delay Carroll Barnett's request that a hearing be scheduled
on his SSI claim, and order that said hearing be scheduled im-
mediately, or, in the alternative, ordering that benefits be
paid pending a hearing;

3. Grant a preliminary and permanent injunction en-
joining Defendant Weinberger, his agents and employees from
delaying the scheduling of hearings for plaintiffs and the class
they represent, and ordering that all such hearings be scheduled
within a reasonable time after the request therefor, as

Court may determine to be consistent with the due process clause of the Fourteenth Amendment, the Social Security Act, and the Administrative Procedure Act, or, in the alternative, ordering that benefits be paid if hearings are not scheduled within a reasonable time after the request therefor, pending such hearings.

Dated at St. Johnsbury, Vermont, this 18 day of November, 1974.

Zander B. Rubin
Zander B. Rubin, Esq.
Vermont Legal Aid, Inc.
56 Railroad Street
St. Johnsbury, Vermont
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Zander B. Rubin, hereby certify that I served a copy of the foregoing Amended Complaint on the following by mailing a copy thereof, first class mail, proper postage affixed, to the following address:

Jerome O'Neill, Esq.
Assistant U.S. Attorney
Rutland, Vermont 05701

Dated: 11/18/74

Zander B. Rubin
Zander B. Rubin, Esq.
Vermont Legal Aid, Inc.
Attorneys for Plaintiffs

COPY

DISTRICT OF VERMONT
FILED

MAY 6 10 35 AM '75

CLERK
DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Carroll Barnett; Harold
McBrine, on behalf of
themselves and all others
similarly situated

v.

Caspar Weinberger, Secretary
of the Department of Health,
Education and Welfare

Civil Action

File No. 74-270

OPINION AND ORDER

By this civil action, plaintiffs Carroll Barnett and Harold McBrine seek declaratory and injunctive relief compelling the Social Security Administration within a reasonable time to schedule redetermination hearings on their appeals from adverse administrative reconsideration of the denial of their claims for disability benefits under the Supplemental Security Income program (SSI). 42 U.S.C. § 1381 et seq. The dispute does not involve the plaintiffs' entitlement to such a hearing, see 20 C.F.R. § 416.1425, nor the time within which such a hearing must be held, but only the time within which such a hearing must be scheduled. The plaintiffs' claim is based upon the due process clause, the Social Security Act, 42 U.S.C. § 1383(c)(2), and the Administrative Procedure Act, 5 U.S.C. § 555(b).

The plaintiffs requested class action certification both in their original complaint and by supplemental motion. Additionally, Maurice Washburn, Walter Chapin, Calvin Basset, Raymond Grenier, Greta Vincent and Hattie McGiven have filed motions to intervene as party plaintiffs.

027

MAY 7 1975

The defendant moved to dismiss on the basis that the court lacked jurisdiction and also that the case was moot because the named plaintiffs have both received their re-determination hearings.

On the question of jurisdiction, the plaintiffs have asserted that jurisdiction may be based upon 28 U.S.C. § 1361 (Mandamus) and 5 U.S.C. § 701 et seq. (Administrative Procedure Act).

While there is some authority to the effect that the Administrative Procedure Act provides an independent basis for jurisdiction, see, e.g., Davis v. Romney, 355 F. Supp. 29, 40-42 (E.D. Pa. 1973), this Court concurs with the prevailing view that the Administrative Procedure Act "does not confer upon a court . . . any additional jurisdiction not expressly authorized by a separate statutory grant of power." Arizona v. HEW, 449 F.2d 456, 464 (9th Cir. 1971), cert. denied, 405 U.S. 919 (1972), and we have so held. Davis v. Weinberger, Civil 6567 (D. Vt. Nov. 1974). See also Zimmerman v. United States, 422 F.2d 326, 330 (3d Cir.), cert. denied, 339 U.S. 911 (1970); and Bramblett v. Desobry, 490 F.2d 405, 407 (6th Cir.), cert. denied, 43 U.S.L.W. 3212 (U.S. Oct. 15, 1974).

A mandamus action will lie when a plaintiff seeks to compel a federal official to perform certain ministerial, non-discretionary acts. As set forth in Lovullo v. Froehlke, 468 F.2d 340, 343 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973), "generally speaking before the writ of mandamus may properly issue, three elements must co-exist; (1) a clear right in the plaintiff to the relief sought; (2) a plainly defined

and peremptory duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available." In the case at hand these three criteria are clearly met. First, the SSI regulations clearly establish a right to an administrative reconsideration hearing, 20 C.F.R. § 416.1425. Second, the Administrative Procedure Act quite clearly imposes a duty to act within a reasonable time, 5 U.S.C. § 555(b), and this duty has been held to be mandatory. Deering Milliken v. Johnston, 295 F.2d 856, 860 (4th Cir. 1961). And, third the very essence of the plaintiffs' action is that their administrative remedies are inadequate because of the alleged long delay in scheduling the reconsideration hearings.

The defendant argues that since neither the Administrative Procedure Act nor the applicable SSI regulation proscribe an exact time within which to schedule a reconsideration hearing, the Social Security Administration has the discretion to schedule hearings as it sees fit and therefore mandamus is inappropriate. No doubt the Social Security Administration has some flexibility, but the mandate of the Administrative Procedure Act is quite clear--the agency must act within a reasonable time. Consequently we are of the opinion that the Court has the power to compel agency action within a reasonable period. Furthermore, even a discretionary act may fall within the reach of mandamus if the official has gone so far beyond his discretion as to warrant judicial interference. See Nixon v. Secretary of the Navy, 422 F.2d 934, 939 (2d Cir. 1970) and Schonbrun v. Commanding Officer, 403 F.2d 371, 374 (2d Cir. 1968), cert. denied, 394 U.S. 929 (1969). This is because "[t]he discretion which cannot be

controlled [by] mandamus is that discretion, and only that discretion, which the law has vested in the officer, to be exercised by him. The discretion must be exercised under the law, and not contrary thereto; it must not be arbitrary, vague, or fanciful but legal, regular, and sound discretion which must be governed by rule and exercised under established principles of law." 52 Am. Jur.2d Mandamus § 79 (1970).

In light of the foregoing opinion the court concludes that it has jurisdiction of this cause under 28 U.S.C. § 1361, and that portion of defendant's motion to dismiss which is predicated on lack of jurisdiction is hereby denied.

With respect to the mootness argument, it appears uncontradicted that the original plaintiffs have had their hearings scheduled and actually held. This is also the case with some of the proposed intervening plaintiffs, and other proposed intervenors had had hearings scheduled. There are two proposed intervenors, Raymond Grenier and Hattie McGiven, who have not yet had hearings scheduled and the Court hereby grants their motion to intervene.^{1/}

In this regard, we should point out that the plaintiffs have moved for class action certification. Because of the defendant's repeated denials of the existence of any class, and the factual dispute engendered thereby, the Court will reserve decision on the motion for class action certification pending a hearing at which evidence relative to the existence of a class shall be introduced.

At such hearing the Court is particularly interested in receiving evidence as to the number of individuals in the

proposed class and on the issue of reasonableness as a question of fact common to the class, it appearing to the Court that possibly such issue may best be determined on an individual basis in each particular case. In addition, the Court will take such other evidence as the parties believe is pertinent or necessary to a proper determination of the class action question. The Court also reserves decision on the defendant's motion to dismiss for mootness until said hearing has been held.

Dated at Burlington in the District of Vermont,
this 5th day of May, 1975.

Albert W. Coffrin
District Judge

7031

FOOTNOTE

1/ At the hearing held on March 24, 1975 counsel for the defendant represented that the hearing in the case of Greta Vincent would be scheduled by the Social Security Administration sometime during the month of April. As of May 2, 1975, according to a letter from plaintiff's counsel, no such hearing had been scheduled although possibly this would be done during the week of May 12, 1975. At this juncture the Court takes no action with reference to her motion to intervene but will act in due course in such manner as may be necessary as disclosed by the evidence and the circumstances require.

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CARROLL BARNETT; HAROLD McBRINE,
on behalf of themselves and all
others similarly situated,

v.

Civil Action No. 74-270

CASPAR WEINBERGER, Secretary of
the Department of Health,
Education, and Welfare,

Defendant.

DEFENDANT'S ANSWERS TO PLAINTIFFS' INTERROGATORIES

Now comes the defendant, Secretary of the Department of Health,
Education, and Welfare, by his attorneys, and pursuant to Rule 33 of the
Federal Rules of Civil Procedure hereby answers plaintiffs' interrogatories
as follows:

INTERROGATORY #1

Q. Please state the total number of persons who have filed claims
for SSI disability benefits in Vermont, and give the date that this
figure is current to (if statistics are not available breaking down
total SSI applications into the subcategory of disability applications,
please give the total number of persons who have filed claims for SSI
benefits in Vermont, and please apply this to future questions of a
similar nature).

A. The total number of SSI only disabled and blind applications
received in Vermont in the January, 1974 through April, 1975 period was
1,403.

The total number of concurrent SSI and Title II social security
disability applications received in Vermont in the January, 1974 through
April, 1975 period was 2,149.

INTERROGATORY #2

Q. Please state the total number of persons in Vermont who have had initial determinations approving SSI disability claims, and state the total number of persons in Vermont who have had initial determinations denying SSI disability claims, and give the date that these figures are current to.

A. As of May 28, 1975, there were 1,542 initial determinations approving SSI blindness or disability claims in Vermont. As of the same date, there were 1,301 initial determinations denying SSI blind/disabled claims.

INTERROGATORY #3

Q. Please state the total number of persons in Vermont who have requested reconsideration of SSI disability claims, and give the date that this figure is current to.

A. From January, 1974, through April, 1975, 272 applications for reconsideration of claims for SSI benefits on account of blindness or disability were received.

INTERROGATORY #4

Q. Please state the total number of persons in Vermont who have had Reconsideration determinations approving SSI disability claims, and state the total number of persons in Vermont who have had Reconsideration determinations denying SSI disability claims, and give the date that these figures are current to.

A. The latest figures available, for January 1, 1974, through March 1, 1975, show that 62 SSI disability claims were allowed on reconsideration, and 155 disability claims were denied on reconsideration. 1/

1/ There were additionally 13 "rollback" reconsiderations for persons who did not meet the law's requirement (42 U.S.C. 1382c(a)(3)(E)) for conversion because they were not eligible for and receiving State disability benefits in December, 1973, and for one month prior to July, 1973. Of these cases, two were found disabled under federal criteria on reconsideration, and 11 were denied on reconsideration.

The statistics provided in this answer are not kept as a matter of course. These totals were arrived at only through a special manual count. This procedure inherently contains a probability of some error, so some caution is warranted in considering these figures.

INTERROGATORY #5

Q. Please give a month by month breakdown in regard to SSI disability claims as to number of claims filed, number of favorable initial determinations rendered, number of unfavorable initial determinations rendered, number of reconsiderations requested, number of favorable Reconsideration determinations, and number of unfavorable Reconsideration determinations.

A. (A) SSI only disability and blind applications received:

January, 1974	36	September, 1974	63
February, 1974	97	October, 1974	85
March, 1974	93	November, 1974	88
April, 1974	135	December, 1974	74
May, 1974	90	January, 1975	83
June, 1974	123	February, 1975	84
July, 1974	80	March, 1975	92
August, 1974	73	April, 1975	107

Concurrent SSI, Title II applications received:

January, 1974	129	September, 1974	113
February, 1974	126	October, 1974	155
March, 1974	123	November, 1974	147
April, 1974	123	December, 1974	123
May, 1974	186	January, 1975	147
June, 1974	180	February, 1975	120
July, 1974	121	March, 1975	125
August, 1974	94	April, 1975	137

(B) Statistics on favorable and unfavorable initial

determinations are not available on a strict month by month basis.

The following are figures for January and February, 1974 and weekly thereafter.

Favorable initial determinations on SSI blind/
disabled claims.

<u>Week ending</u>	<u>Allowances</u>
January, 1974 -	119
February, 1974	
3/06/74	14
3/13/74	138
3/20/74	59
4/03/74	13
4/10/74	41
4/17/74	28
4/24/74	34
5/01/74	39
5/08/74	24
5/15/74	24
5/22/74	21
5/29/74	10

<u>Week ending</u>	<u>Allowances</u>
6/05/74	16
6/12/74	26
6/19/74	14
6/26/74	13
7/03/74	25
7/10/74	13
7/17/74	28
7/24/74	25
8/07/74	5
8/14/74	20
8/21/74	15
8/28/74	19
9/04/74	4
9/11/74	18
9/18/74	18
9/25/74	19
10/02/74	26
10/09/74	20
10/16/74	16
10/23/74	33
10/30/74	14
11/06/74	16
11/13/74	39
11/27/74	6
12/04/74	17
12/11/74	37
12/18/74	33
12/25/74	30
01/01/75	4
01/15/75	58
01/22/75	35
01/29/75	—
02/05/75	N/A
02/12/75	—
02/19/75	17
02/26/75	26
03/05/75	9
03/12/75	32
03/19/75	24
03/26/75	11
04/02/75	17
04/09/75	14
04/16/75	21
04/23/75	21
04/30/75	18
05/07/75	26
05/14/75	15
05/21/75	24
05/28/75	14

Unfavorable initial determinations on SSI blind/disabled claims.

<u>Week ending</u>	<u>Denials</u>
January, 1974 -	12
February, 1974	
03/06/74	21
03/13/74	14
03/20/74	33

<u>Week ending</u>	<u>Denials</u>
04/03/74	26
04/10/74	16
04/17/74	38
04/24/74	30
05/01/74	41
05/08/74	10
05/14/74	18
05/22/74	31
05/29/74	17
06/05/74	19
06/12/74	21
06/19/74	31
06/26/74	26
07/03/74	27
07/10/74	15
07/17/74	21
07/24/74	23
07/31/74	33
08/07/74	7
08/14/74	23
08/21/74	8
08/28/74	15
09/04/74	13
09/11/74	11
09/18/74	18
09/25/74	18
10/02/74	18
10/09/74	20
10/16/74	8
10/23/74	36
10/30/74	18
11/06/74	18
11/13/74	25
11/27/74	11
12/04/74	26
12/11/74	27
12/18/74	23
12/25/74	24
01/01/75	15
01/15/75	30
01/22/75	31
01/29/75	—
02/05/75	N/A
02/12/75	—
02/19/75	21
02/26/75	27
03/05/75	8
03/12/75	20
03/19/75	28
03/26/75	15
04/02/75	24
04/09/75	15
04/16/75	24
04/23/75	26
04/30/74	23
05/07/75	30
05/14/75	30
05/21/75	18
05/28/75	26

(C) SSI disability and blind reconsideration requests received.

January, 1974	0	September, 1974	12
February, 1974	0	October, 1974	20
March, 1974	0	November, 1974	25
April, 1974	not shown	December, 1974	22
May, 1974	15	January, 1975	22
June, 1974	27	February, 1975	40
July, 1974	17	March, 1975	24
August, 1974	11	April, 1975	37

(D) A month by month breakdown of reconsideration decisions is not available.

INTERROGATORY #6

Q. Please state the total number of persons in Vermont who have requested hearings after they received an unfavorable Reconsideration determination on their SSI disability claims, and give the date that this figure is current to.

A. The total number of SSI hearings and appeals receipts for Vermont for January, 1974 through April, 1975 was 104. This figure is the total of all SSI requests for hearings. Thus, it includes more than just hearings requested after an unfavorable initial determination upon initial application and unfavorable reconsideration. Also included are requests for hearings in rollback cases and requests for hearings after a cessation of disability payments due to medical evidence of improved condition. No statistical breakdown is available as to the reasons which precipitate a request for hearing.

INTERROGATORY #7

Q. Please give a breakdown as to how many requests for hearing were filed in each month up to and including the most recent month that statistics have been compiled for.

A. The monthly breakdown of SSI hearing and appeal receipts is as follows: 2/

January, 1974	0	September, 1974	1
February, 1974	0	October, 1974	15
March, 1974	0	November, 1974	7
April, 1974	3	December, 1974	15
May, 1974	3	January, 1975	13
June, 1974	6	February, 1975	6
July, 1974	10	March, 1975	7
August, 1974	7	April, 1975	11

2/ These figures are subject to the same caveat expressed in answer 6.

Q. Please give a breakdown as to how many of the hearings requested were for concurrent SSI-Social Security claims, and how many were for straight SSI claims.

A. The total number of Title II hearing and appeal receipts for January, 1974 through April, 1975 period is 170. The total number of SSI hearing and appeal receipts during this period is 104. 3/ There are no available figures on concurrent hearings requested.

INTERROGATORY #9

Q. Please state how many hearings have been held on SSI disability claims, and for each hearing held to date, please give the date of request for hearing, and the date that the hearing was held.

A. There have been 61 hearings on SSI disability claims in Vermont as of June 3, 1975.

<u>Date of request for hearing</u>	<u>Date hearing held</u>
03/21/74	12/12/74
04/05/74	12/11/74
04/17/74	11/18/74 <u>4/</u>
04/23/74	10/02/74
05/06/74	12/12/74
05/14/74	10/02/74
06/05/74	12/12/74
06/12/74	12/11/74
06/18/74	12/12/74
06/23/74	12/10/74
06/27/74	12/12/74
06/27/74	12/11/74
07/16/74	12/10/74
07/23/74	12/12/74
07/31/74	12/12/74
08/19/74	12/10/74
08/30/74	12/10/74
08/30/74	12/11/74
09/04/74	12/12/74
09/25/74	12/12/74
09/26/74	12/11/74
09/30/74	12/12/74
10/15/74	12/11/74
10/24/74	02/10/75
11/14/74	03/17/75
12/13/74	03/18/75
01/14/75	03/18/75
06/05/74	03/18/75 <u>5/</u>
12/13/74	03/19/75
10/15/74	03/19/75 <u>6/</u>
10/17/74	03/19/75
01/21/75	03/19/75

3/ These figures are subject to the same caveat expressed in answer 6.

4/ Hearing first scheduled to be held 08/20/74. Individual requested postponement - Hearing rescheduled and held 11/18/74.

5/ Hearing had been scheduled twice before but was postponed on each of the earlier dates at claimant's request.

6/ Decision on the record.

Date of request for hearing

Date hearing held

10/02/74	03/20/75
06/27/74	03/20/75 <u>7/</u>
11/19/74	03/20/75
11/05/74	03/20/75
12/16/74	03/21/75
12/16/75	03/21/75
07/31/74	03/12/75
07/01/74	03/25/75
06/04/74	03/10/75
09/25/74	03/10/75
10/03/74	03/11/75
07/31/74	03/12/75
01/14/75	03/18/75
07/01/74	03/25/75
07/17/74	03/26/75
11/07/74	05/06/75
02/07/75	05/07/75
03/11/75	05/07/75
03/11/75	05/07/75
02/14/75	05/08/75
03/07/75	05/08/75
10/18/74	05/13/75
10/23/74	05/14/75
12/06/74	05/28/75
02/03/75	05/28/75
02/07/75	05/28/75
03/18/75	06/03/75
03/25/75	06/03/75
03/31/75	06/03/75

Interrogatory #10

Q. Please state if any of the hearings held and listed in answer to question No. 9 were held as a result of this lawsuit, and if so, state how many, and describe the process that resulted in the scheduling of such hearings.

A. Twenty-one of the hearings listed in No. 9 were held shortly after the institution of this lawsuit. It was the defendant's opinion that the court should have an opportunity to examine and rule on the merits of the suit rather than issue a temporary order based on incomplete data. For that reason many of the 21 hearings mentioned were expedited.

INTERROGATORY #11

Q. Please describe the administrative process that occurs from the date that a request for an SSI disability hearing is received until the date that the hearing is held, differentiating, if there is a difference, between concurrent SSI-Social Security claims and straight SSI claims.

A. When a request for hearing is made it is routed through a Bureau of Hearings and Appeals development center. The development

040

7/ Hearing had been scheduled twice before but was postponed on

center obtains the claims file if it is not received with the request, takes action to obtain any evidence which the file indicates is available but which is not included in the record, and completes the clerical preparation of the file. After development center action, the case is forwarded to the hearing office where it is placed on the master calendar based on the date of the request for hearing. Hearings are scheduled as the case comes up on the docket on the basis of the date of the request for hearing. There is no difference in this basic process for concurrent SSI-Social Security claims and SSI-only claims with the exception of the category of hearings officers needed (See the answer to Interrogatory No. 12).

INTERROGATORY #12

Q. Please state who conducts the hearings for concurrent SSI-Social Security disability claims and who conducts hearings for straight SSI disability claims. Please state if different persons are used for hearing these two classes of cases and if so, please state why.

A. An SSI disability hearing may be conducted by an Administrative Law Judge or a Hearing Examiner, SSI. A concurrent SSI (Title XVI/Social Security (Title II)) disability hearing is conducted by an Administrative Law Judge.

Congress recognized the difficulty in recruiting Administrative Law Judges, and, in §1631(d)(2) of the Social Security Act, as amended, provided that, to the extent it would promote the achievement of the objectives of title XVI, hearing examiners may be appointed without meeting the specific requirements for Administrative Law Judges who are appointed pursuant to 5 U.S.C. 3105. This provision is limited to hearings conducted under Title XVI. Concurrent SSI/Social Security disability cases involve a claim under title II of the Act, and such hearings must be conducted by an Administrative Law Judge.

INTERROGATORY #13

Q. Please state how many persons are presently employed by the Social Security Administration to hear Vermont SSI disability applications, both the concurrent SSI-Social Security claims and the straight SSI claims, giving a breakdown into categories if one exists.

A. One hearing office currently services Vermont — Manchester, New Hampshire, which has three Administrative Law Judges and one Hearing Examiner, SSI. (Until recently, some SSI hearings for Vermont were serviced by the Springfield, Massachusetts hearing office).

INTERROGATORY #14

Q. Please state how many persons the Social Security Administration estimates it will need to employ to hear Vermont SSI disability applications.

A. The three Administrative Law Judge's and one Hearing Examiner employed to hear Vermont cases should provide adequately for Vermont SSI disability hearings based on the present workload estimates. The Hearing Examiner began work in April, 1975.

INTERROGATORY #15

Q. Please state where these hearing officers are located, how they are assigned to hear Vermont SSI disability cases, and whether they are also assigned to hear SSI cases arising in other states, and if so, what other states.

A. Vermont cases are currently heard by the hearing office located in Manchester, New Hampshire, as indicated in No. 13. SSI disability cases pending hearing in Vermont are assigned to a hearing officer on rotation based on the date the request for hearing is filed. Hearing officers in the Manchester hearing office also hear SSI cases in Maine and New Hampshire.

INTERROGATORY #16

Q. Please state the relationship, if any, between the scheduling of hearings for Vermont SSI disability claims (both concurrent SSI-Social Security and straight SSI), and the scheduling of hearings for Vermont Social Security claims.

A. The procedure for scheduling hearings are the same for all programs. Cases are entered on the docket based on the date of the request for hearing. An Administrative Law Judge schedules hearings on all types of cases in the order in which they were filed. A Hearing Examiner schedules "straight" SSI cases in the same manner.

INTERROGATORY #17

Q. Please state if any kind of hearing list is prepared for Vermont SSI disability hearings, and, if so, please state how such a list is prepared and how it operates in scheduling said hearings.

A. Each hearing office has a master calendar of cases pending in that hearing office. Each hearing officer has a docket listing all the cases assigned to him or her.

INTERROGATORY #18

Q. If the answer to question No. 17 was yes, please state if concurrent SSI-Social Security cases are combined on such a list with requests for hearings on straight Social Security cases, or state what, if any, relationship exists between the scheduling of hearings for concurrent SSI-Social Security cases and the scheduling of hearings for straight Social Security cases.

A. Since Hearing Examiners hear SSI cases only, their docket would contain only those cases. If SSI only cases are assigned to an Administrative Law Judge, his case docket may contain SSI only, concurrent SSI/Social Security, and straight Social Security cases.

Travel and hearings are generally scheduled on a geographic basis. When an Administrative Law Judge plans a trip, all types of cases pending on his or her docket for the geographic area may be scheduled for hearings.

INTERROGATORY #19

Q. If there is a relationship between the scheduling of hearings for concurrent SSI-Social Security and the scheduling of hearings for straight Social Security cases, please state how many requests for hearings for straight Social Security cases were received by the hearing office that is responsible for holding Vermont hearings, for the year 1974, 1973, 1972, and 1971.

A. Records of yearly receipts are compiled on a fiscal year (FY) basis. The Manchester, New Hampshire, hearing office, which is responsible for holding "straight" Social Security and SSI hearings in Vermont, opened

eight months after the dates the hearing requests were filed.

INTERROGATORY #23

Q. Please estimate what the average time spent between requests for SSI disability hearings and the scheduling thereof will be in Vermont for the years 1975 and 1976. Please state how such an estimate was arrived at.

A. The objective by the end of fiscal year 1976 (September 30, 1976) is to reduce the backlog to no more than 90 days and to have all hearings held within 100 days of the date of the request for hearing.

Processing time will be reduced as backlogs are reduced. The rate of progress, however, is dependent on a number of variables - largely funding and staffing.

INTERROGATORY #24

Q. Please state why, if such a reason exists, SSI disability cases can't be scheduled within the [same] time span as non-disability cases.

A. Major factors at present are the workload and staffing problems. Even when backlogs and processing times are reduced, disability cases will normally require longer processing time as development of the medical record, including the ordering of consultative examinations, obtaining testimony or answers to interrogatories by medical advisors and vocational experts is time consuming.

INTERROGATORY #25

Q. In Defendant's Motion to Dismiss it was stated that future non-disability hearings will be provided within 90-days. Please state why disability cases can't be scheduled within this same 90-day time span.

A. The Statute requires that non-disability hearing decisions must be rendered within 90-days of the request for hearing. Recognizing that in disability cases obtaining additional medical evidence is time consuming, Congress excluded disability from the 90-days requirement. It would be to the individual's disadvantage to have a hearing scheduled before obtaining the required evidence because it is impossible to determine when all the evidence will be in. Several reschedulings might then be

necessary with a resultant disruption of other SSI and non-SSI hearings.

INTERROGATORY #26

Q. Please state how many requests for hearings have been filed to date in Vermont on non-disability SSI cases.

A. There has been one SSI non-disability request for hearing filed in Vermont.

INTERROGATORY #27

Q. Please give any statistics that have been compiled in whatever form available, to date, as to the reversal rates of SSI unfavorable Reconsideration decisions that are appealed to the hearing stage in Vermont, in this region, and nationally.

A. The reversal rates of SSI unfavorable reconsideration decisions nationally is 45.4 percent. For Region I (Boston) the reversal rate is 35.5 percent. No statistics are available on reversal rates on a State by State basis.

INTERROGATORY #28

Q. Please give any statistics that have been compiled in whatever form available, for the years 1974, 1973, and 1972, as to the reversal rates of Social Security unfavorable Reconsideration decisions that are appealed to the hearing stage in Vermont, in this region, and nationally.

A. Reversal rates of unfavorable reconsideration decisions on Social Security claims are as follows:

	Fy 1972	FY 1973	FY 1974
National	42.6%	44.7%	47.2%
Regional	40.5%	44.6%	48.1%

No statistics are available as to such reversal rates on a State by State basis.

INTERROGATORY #29

Q. Please state if any regulations have been proposed that will mandate the scheduling of SSI disability cases within any time span.

A. No such regulations have been proposed.

INTERROGATORY #30

Q. Please state or estimate when Maurice Washburn's hearing will be held.

A. Mr. Washburn's hearing was held on February 10, 1975.

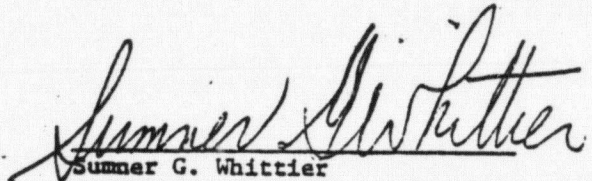
INTERROGATORY #31

Q. Please identify who has provided the answers to the preceding interrogatories.

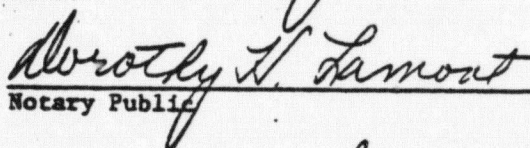
A. Please refer to the verification on the following page.

State of Maryland)
) ss
County of Baltimore)

I, Sumner G. Whittier, being duly sworn, hereby depose and say that I am the Acting Director of the Bureau of Supplemental Security Income, Social Security Administration, Department of Health, Education, and Welfare; that as such I am authorized to and do make this verification for and on behalf of the Secretary of the Department of Health, Education, and Welfare, acting by and through the Social Security Administration, and the Bureau of Supplemental Security Income, Baltimore, Maryland; further, that upon information furnished to me in good faith and on the basis of the best information available from various components within SSA, the undersigned representative of the Secretary of the Department of Health, Education, and Welfare hereby declares that the aforesaid answers to Plaintiffs' Interrogatories are true to the best of my knowledge, information, and belief.


Sumner G. Whittier
Acting Director
Bureau of Supplemental Security
Income

Subscribed and sworn to before
me this 24th day of June
1975.


Dorothy H. Lamont
Notary Public

My commission expires July 1, 1978.

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CARROLL BARNETT: HAROLD
MCBRINE, on behalf of
themselves and all others
similarly situated,

Plaintiffs,

v.

Civil Action No. 74-270

CASPAR WEINBERGER 1/
Secretary of the Department
of Health, Education, and
Welfare,

Defendant.

DEFENDANT'S ANSWERS TO PLAINTIFFS' INTERROGATORIES

The answers to the plaintiffs' interrogatories are
herewith furnished by the undersigned in good faith and
based upon the best information available to him from various
sources within the Social Security Administration.

INTERROGATORY #1

Q. For all of the named plaintiffs and intervenors to
wit: Carroll Barnett, Harold McBrine, Walter Chapin, Maurice
Washburn, Calvin Bassett, Greta Vincent, and Beverly Baird,
please give the following information for each:

a) The date of initial S.S.I. application; the date of
initial denial; the date reconsideration was requested;
the date reconsideration was denied; the date a hearing
was requested; the date a hearing was held.

A. a) Carroll Barnett

SSI application filed	February 6, 1974
Initial denial	March 22, 1974
Reconsideration request filed	April 29, 1974
Reconsideration decision	May 31, 1974
Hearing request filed	June 24, 1974
Hearing held	December 10, 1974

1/ David Mathews succeeded Caspar Weinberger as
Secretary of Health, Education and Welfare on August
11, 1975. David Mathews should be substituted, therefore,
for Caspar Weinberger as the defendant in the suit. No
further action need be taken to continue the suit by
reason of the last sentence of section 205(g) of the
Act, 42 U.S.C. 405(g). See Sec. 1631(c)(3) of the Act,
42 U.S.C.

Harold McBrine

SSI application filed	May 9, 1974
Initial Denial	July, 1974
Reconsideration request filed	July 22, 1974
Reconsideration decision	July 31, 1974
Hearing request filed	August 19, 1974
Hearing held	December 24, 1974

Walter Chapin

SSI application filed	April 12, 1974
Initial denial	May 13, 1974
Reconsideration request filed	November 12, 1974
Reconsideration decision	December 10, 1974
Hearing request filed	December 13, 1974
Hearing held	March 19, 1975

Maurice Washburn

SSI application filed	April 12, 1974
Initial denial	May 23, 1974
Reconsideration request filed	July 26, 1974
Reconsideration decision	October 3, 1974
Hearing request filed	October 16, 1974
Hearing held	February 10, 1975

Calvin Bassett

SSI application filed	May 31, 1974
Initial denial	September 29, 1974
Reconsideration request filed	October 2, 1974
Reconsideration decision	October 10, 1974
Hearing request filed	October 17, 1974
Hearing held	March 19, 1975

Greta Vincent

SSI application filed	February 12, 1974
Initial denial	March 19, 1974
Reconsideration request filed	March 26, 1974
Reconsideration decision	April 9, 1974
Hearing request filed	October 18, 1974 ^{2/}
Hearing held	May 13, 1975

Beverly Baird

SSI application filed	October 29, 1974
Initial denial	December 24, 1974
Reconsideration request filed	February 7, 1975 ^{3/}
Reconsideration decision	May 1, 1975
Hearing request filed	May 23, 1974
Hearing held	None

^{2/} Ms. Vincent was allowed to file a hearing request even though the time for so doing had long since expired (on May 9) because good cause for the delay was established.

^{3/} Ms. Baird was allowed to file a reconsideration request even though the time for so doing had expired (on January 24) because good cause for the delay was established. On February 5, 1975, Ms. Baird received a letter from her attorney advising her that she had 6 months to file a reconsideration of her Title II claim. The letter did not mention SSI and Ms. Baird presumed she also had 6 months, rather than 30 days, to file the SSI reconsideration request.

INTERROGATORY #2

Q. For all of the persons named in question #1, please describe all actions taken for each case between the request for a hearing, and the holding of the hearing. This should include but not be limited to; transmission of files (to and from where and when); development of the case (what was done to develop it and where and when this was done); gathering of additional medical evidence or attempts to gather such evidence (where this was done and when); and any other action taken relative to the handling of these cases.

A. Carroll Barnett

Hearing request filed	June 24, 1974
Medical information received in district office	July 17, 1974
Indication that folder sent to Manchester by mistake, district office sent folder to BHA Development Center in Boston to associate with title II folder.	July 25, 1974
District Office received notice of hearing to be scheduled December 10, 1974	November 26, 1974
District office received notice of hearing reversal decision.	February 3, 1975

Harold McBrine

Hearing request filed	August 19, 1974
Folder sent to BHA Development Center in Boston	August 22, 1974
Case sent to Manchester Hearing Office	September 19, 1974
Hearing decision, reversal	December 24, 1974

Walter Chapin

Hearing request filed	December 13, 1974
District office sent SSA-501 (Request for Hearing), SSI application, medical evidence to BHA, Boston Development Center	January 15, 1975
Folder sent to Montpelier District Office from Claims Review Section (CRS) in Boston. District office then sent folder to BHA, Boston to associate with information sent January 15, 1975	February 20, 1975

Walter Chapin (cont)

District office got notice
that the hearing was scheduled
for March 19, 1975 March 7, 1975

At the hearing the counsel for
Chapin requested further medical
evidence. The medical evidence used
in this case was for the period
April, 1961 - March, 1975 March 19, 1975

District office got hearing decision
that Chapin was found eligible June 2, 1975

District office sent all pertinent
forms to RAU to effectuate payment
amount and input to system July 11, 1975

Maurice Washburn

Hearing request filed October 16, 1974

Montpelier District Office sent
the folder to the Hearing Office October 17, 1974

District office received medical
records from VA and sent these to
the hearing office in Boston November 11, 1974

District office received letter
to Vermont Legal Aid from VA and
sent to ALJ in Boston to associate
with folder December 18, 1974

District office got notice of
hearing scheduled for
February 10, 1975 February 3, 1975

District office got notice of hearing
decision, Washburn determined
eligible for SSI June 27, 1975

Calvin Bassett

Hearing request filed October 17, 1974

Notice of receipt of request for
hearing sent to claimant from
Development Center - October 18, 1974

A request for medical information
made to VA by Development Center October 23, 1974

Letter from Vermont Legal Aid, Inc.
to Chief of Development Center stated
not ready for hearing because Legal Aid
had not gotten medical evidence October 25, 1974

Hospital summary from June 17,
1974 - July 30, 1974 from White River
Junction VA requested by Development
Center November 10, 1974

Another request for VA medical records
to VA Hospital in Albany, New York
by Development Center November 14, 1974

Calvin Bassett (cont)

Letter to Vermont Legal Aid, Inc.
from the Albany Medical Center
Hospital enclosing requested
data. November 24, 1974

Notice of assignment of case
for hearing to claimant January 10, 1975

Letter to Vermont State Agency
concerning letter sent to claimant
by the Hearing Examiner (Greenberg)
concerning a consultative
examination January 22, 1975

Disability Determination Services
(DDS) sent letter to claimant
about scheduling consultative
examination January 24, 1975

Claimant did not appear and second
notice sent rescheduling the
consultative examination January 30, 1975

Hearing Office received appointment
of representative from claimant February 5, 1975

DDS received medical report on
eye examination February 13, 1975

Hearing Examiner (Greenberg) sent
notice of date of hearing to
claimant March 5, 1975

Received card from claimant that
he would appear for hearing on
March 19, 1975. March 7, 1975

Hearing held March 19, 1975

The following information was
submitted at the hearing:

1. Copy of certificate of VA benefits for January 1,
1974 to January 1, 1975.
2. Report from VA Hospital at White River Junction
dated August 16, 1974.
3. Outpatient report of the Albany Medical Center
Hospital for July 8, 1973 and October 4, 1973
4. Copy of suspension order from Vermont Department of
Motor Vehicles dated June 2, 1974.

The following was submitted after
the hearing (March 19, 1975) by
Vermont Legal Aid:

1. Discharge summary from VA Hospital, Albany, New York
for October 20, 1973 to October 27, 1973
2. VA outpatient report from White River Junction for
August 16, 1974 through September 30, 1974.

3. Discharge summary from Vermont State Hospital, Waterbury, Vermont, dated February 11, 1975.
4. Evaluation from counselor from Champlain Valley Work and Training Program (undated).
5. Letter dated April 2, 1975, from Vermont Legal Aid, Bob Taren, to Richard Greenberg, Hearing Examiner, enclosing medical evidence number 1 through 4 above.
6. On April 23, 1975, Greenberg wrote to Taren saying record would be kept open until May 1, 1975, for additional medical evidence Taren said he could get.
7. On April 28, 1975, letter from Taren to Greenberg requesting more time because Bassett was to go back into the hospital for an unrelated condition.
8. On April 29, 1975, letter from Greenberg to Taren saying he did not think any further delay was justified.
9. Letter dated May 16, 1975, from Department of Social Services, Albany, New York regarding benefits paid to Bassett for aid to the blind for February 16, 1973 through February 28, 1973 and from May 18, 1973 to December 31, 1973.

Hearing decision issued
denying claim

May 20, 1975

Request for Appeals Council
review

June 23, 1975

Greta Vincent

Hearing request filed

October 18, 1974

Folder sent to BHA Development
Center Boston by Burlington
District Office

October 18, 1974

System generated notice of
disapproved claim

October 23, 1974

Claimant alleges never receiving
initial denial letter, good cause
was established. October 18, 1974
hearing date was accepted as timely
(reconsideration decision April 9,
1974)

Vincent has a Legal Aid attorney
appointed for her

February, 1975

District office received notice that
hearing was scheduled for May 13, 1975 May 2, 1975

Beverly Baird

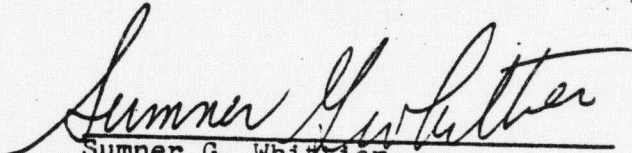
Hearing request filed

May 23, 1975

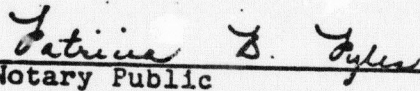
We have been unable to determine what, if any, development has been subsequently undertaken to develop Ms. Baird's hearing request.

State of Maryland)
) ss
County of Baltimore)

I, Sumner G. Whittier, being duly sworn, hereby depose and say that I am the Acting Director of the Bureau of Supplemental Security Income, Social Security Administration, Department of Health, Education, and Welfare; that as such I am authorized to and do make this verification for and on behalf of the Secretary of the Department of Health, Education, and Welfare, acting by and through the Social Security Administration, and the Bureau of Supplemental Security Income, Baltimore, Maryland; further, that upon information furnished to me in good faith and on the basis of the best information available from various components within SSA, the undersigned representative of the Secretary of the Department of Health, Education, and Welfare hereby declares that the aforesaid answers to Plaintiffs' Interrogatories are true to the best of my knowledge, information, and belief.


Sumner G. Whittier
Acting Director
Bureau of Supplemental Security
Income

Subscribed and sworn to before
me this 3rd day of November
1975.


Notary Public

My commission expires July 1, 1978.

COPY

JAN 13 3 34 PM '76

CLERK
BY Jay
DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Carroll Barnett; Harold McBrine,
on behalf of themselves and all
others similarly situated,

and

Raymond Grenier, Hattie McGivern,
Harvey J. LaVigne and Sarah
Sargent,

Plaintiff Intervenor

v.

Caspar Weinberger, Secretary of the
Department of Health, Education
and Welfare

Civil Action

File No. 74-270

OPINION AND ORDER

In its opinion dated May 5, 1975, the Court found that it had mandamus jurisdiction under 28 U.S.C. § 1361 to hear this action in which plaintiffs seek declaratory and injunctive relief compelling the Department of Health, Education and Welfare to schedule reconsideration hearings within a reasonable time after the initial denial of SSI disability claims. At that time, decision was reserved with regard to plaintiffs' motion for class action certification and the defendant's motion for dismissal on grounds of mootness. Subsequently, the Government filed a motion requesting the Court to reconsider the jurisdictional issue on the basis of the Supreme Court's recent decision in Weinberger v. Salfi, 43 U.S.L.W. 4985 (June 26, 1975).

The third sentence of 42 U.S.C. § 405(h) provides that "[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 [§ 1331 et seq.] to recover on any claim arising under this subchapter

057

[OASDI]." The Salfi decision rejected the argument that this language is merely "a codification of the doctrine of administrative remedies," and instead held that the sentence precludes resort to § 1331 for the adjudication of federal statutory or constitutional claims. Salfi clearly indicated that § 405(g) is the exclusive jurisdictional basis for judicial review of any actions brought to recover on claims arising under the Social Security Act.

For the SSI litigant, Salfi sets down an imposing barrier because 42 U.S.C. § 1383(c)(3), which provides for judicial review of adverse claim determinations by the Secretary in SSI cases, incorporates § 405 by reference. Even so, the exclusivity principle articulated in Salfi cannot be logically extended to all situations requiring the exercise of a court's mandamus powers. Quite often, relief by way of mandamus is sought in situations which are unrelated to the actual recovery of SSI benefits. Accordingly, since § 405(g) contemplates a situation where resort to judicial process is necessitated by a final decision of the Secretary,^{1/} mandamus jurisdiction may still be necessary to compel administrative action in situations such as the present one where there can never be a final decision by the Secretary from which an appeal to the courts could be made. For this reason, it is unrealistic to give § 405(g) an exclusive effect which would create a jurisdictional loophole that could potentially be used by the Secretary as a shield for arbitrary administrative activity. Certainly giving § 405(g) an exclusive effect in situations of this kind would in no way promote its statutory purpose of providing "the Secretary [with] the opportunity prior to constitutional litigation to ascertain . . . that the particular claims are neither invalid for other reasons nor allowable under other provisions of the Social Security Act." Weinberger v. Salfi, 43 U.S.L.W. at 4989. Nor would any other principles underlying the exhaustion of remedies doctrine

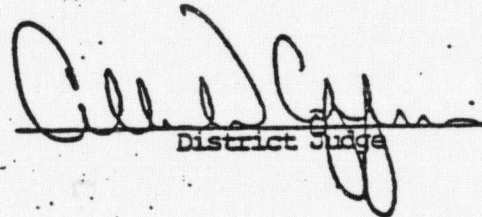
be furthered by precluding mandamus jurisdiction in situations where a resolution of the conflict does not require the agency to compile a factual record or otherwise to exercise its expertise. See McKart v. United States, 395 U.S. 185, 193-194 (1969). If anything, a close reading of § 405(h) indicates that its admittedly broad preclusion extends only to actions brought to recover on claims arising under the Social Security Act. Thus, where recovery on a claim is not involved, the statute does not apply and mandamus jurisdiction may lie.^{2/} See Dahlin v. Weinberger, Civ. Action No. 74-140 (D. Vt., December 22, 1975) and authorities cited therein. None of the post-Salfi decisions cited by the Government suggest otherwise since all of them involved the substantive merits of the applicants' claims. See Wilson v. Mathews, Civ. Action No. 73-C-3070 (N.D. Ill., Sept. 17, 1975); Boles v. Weinberger, Civ. Action No. 74-1734 (D.D.C., Sept. 15, 1975); Mansfield v. Weinberger, Civ. Action No. 75-365 (D.D.C., July 30, 1975); Slone v. Weinberger, Civ. Action No. 75-56 (E.D. Ky., July 18, 1975).

This resolution of the jurisdictional question raised by Salfi is also dispositive of the class action issue since the availability of 28 U.S.C. § 1361 as a jurisdictional base obviates the need for plaintiffs to comply with the exhaustion requirements contained in § 405(g). See generally Weinberger v. Salfi, 43 U.S.L.W. at 4989. As such, there is ample authority for granting certification in cases involving challenges to agency procedures. See, e.g. Martinez v. Weinberger, 73 Civ. 900 (E.D.N.Y. 1975). The Court is satisfied that all the requirements of Rule 23 have been met, and accordingly certifies plaintiffs' class to consist of all present and future applicants for SSI disability benefits whose initial claims are denied on a finding

hearing. Since certification is being effected under Rule 23(b) (2), the Court finds in its discretion that neither individual notice to all class members nor some alternative type of notice is required in this case. See Stone v. Philbrook, Civil Action No. 73-104 (D. Vt. 1974), rev'd on other grounds, Docket No. 75-7066 (2d Cir., Dec. 3, 1975); Vermont Low Income Advocacy Council v. Davis, Civil Action No. 74-49 (D. Vt., Nov. 1, 1974) and Davis v. Weinberger, Civil Action No. 6667 (D. Vt., Nov. 19, 1974). See also Lynch v. Household Finance Corp., 360 F. Supp. 720 (D. Conn. 1973).

Finally, with the recent intervention of Harvey J. LaVigne and Sarah Sargent as party plaintiffs to this action, the defendant's motion for dismissal on grounds of mootness must be denied. Moreover, since these individuals are presently involved in a "case and controversy" which is "capable of repetition, yet evading review," their membership in the class at this time precludes the possibility of a future dismissal on the basis of mootness. Sosna v. Iowa, 419 U.S. 393, 399-402 (1975).

Dated at Burlington in the District of Vermont, this 13th day of January, 1976.


District Judge

FOOTNOTES

1/ Similarly, 42 U.S.C. § 1383(c)(3) is concerned only with judicial review of final determinations by the Secretary after a hearing as provided by statute.

2/ In Salfi, § 1361 jurisdiction apparently was alleged by the plaintiffs, but was not discussed by the Court. However, in addition to injunctive relief, Salfi also involved a claim for "damages or sums due and owing equivalent to the amount of benefits to which plaintiffs became entitled as of the date of said entitlement." Weinberger v. Salfi, 43 U.S.L.W. at 4987. Therefore, since the action was actually one to recover on a claim, the § 405(h) preclusion could logically be extended to mandamus jurisdiction because there had been no deprivation of the opportunity to obtain a final decision by the Secretary from which an appeal to the courts could be made.

FOR THE
DISTRICT OF VERMONT

CARROLL BARNETT, HAROLD *
McBRINE, on behalf of *
themselves and all others*
similarly situated, *

Plaintiffs *

v. *

Civil Action Number 74-270

DAVID MATHEWS, Secretary *
of the Department of *
Health, Education and *
Welfare, *

Defendant. *

DEPENDANT'S SUPPLEMENTAL RESPONSES TO
PLAINTIFFS' INTERROGATORIES DATED
JANUARY 27, 1975

Defendant has endeavored to be as responsive as possible in supplementing his answers to plaintiffs' interrogatories. According to the provisions of Rule 26(e) of the Federal Rules of Civil Procedure, as amended, and upon information that is furnished in good faith and on the basis of the best information available to the Social Security Administration, the Secretary of the Department of Health, Education and Welfare hereby supplements his answers to the plaintiffs' interrogatories in this action dated January 27, 1975, as follows:

INTERROGATORY #1

Q. Please state the total number of persons who have filed claims for SSI disability benefits in Vermont, and give the date that this figure is current to (if statistics are not available breaking down total SSI applications into the subcategory of disability applications, please give the total number of persons who have filed claims for SSI benefits in Vermont, and please apply this to future questions of a similar nature).

A. The total number of SSI disabled/blind applications received January 1974 - December 1975 is 3,025.

The total number of concurrent title II/title XVI applications received January 1974 - June 1975 is 2,252.

INTERROGATORY #2

Q. Please state the total number of persons in Vermont who have had initial determinations approving SSI disability claims, and state the total number of persons in Vermont who have had initial determinations denying SSI disability claims, and give the date that these figures are current to.

A. As of July 30, 1975, there were 1,722 initial determinations approving SSI blindness or disability claims in Vermont. As of the same date, there were 1,428 initial determinations denying SSI blind/disabled claims.

INTERROGATORY #3

Q. Please state the total number of persons in Vermont who have requested reconsideration of SSI disability claims, and give the date that this figure is current to.

A. The total number of SSI aged/blind/disabled reconsideration applications received January 1974 - June 1975 is 395. After June 1975, only SSI aged reconsideration figures are available. There were 394 SSI aged reconsideration applications for the period July 1975 - December 1975.

INTERROGATORY #4

Q. Please state the total number of persons in Vermont who have had Reconsideration determinations approving SSI disability claims, and state the total number of persons in Vermont who have had Reconsideration determinations denying SSI disability claims, and give the date that these figures are current to.

A. SSA began keeping statistics on reconsiderations in November 1975. The first month for which they have any statistics is December 1975. In that month the total number of reconsiderations affirmed in Vermont were 35; the total reversed were 10.

INTERROGATORY #5

Q. Please give a month by month breakdown in regard to SSI disability claims as to number of claims filed, number of favorable initial determinations rendered, number of unfavorable initial determinations rendered, number of reconsiderations requested, number of favorable Reconsideration determinations, and number of unfavorable Reconsideration determinations.

A. The monthly breakdown of SSI disabled/blind applications received is as follows:

1/74	36	9/74	63	5/75	174
2/74	97	10/74	85	6/75	166
3/74	93	11/74	88	7/75	230
4/74	135	12/74	74	8/75	188
5/74	90	1/75	83	9/75	210
6/74	123	2/75	84	10/75	262
7/74	80	3/75	92	11/75	207
8/74	73	4/75	107	12/75	185

The monthly breakdown of concurrent title II/title XVI applications received is as follows:

1/74	129	9/74	113	5/75	56
2/74	126	10/74	155	6/75	47
3/74	123	11/74	147		
4/74	123	12/74	123		
5/74	186	1/75	147		
6/74	180	2/75	120		
7/74	121	3/75	125		
8/74	94	4/75	137		

The monthly breakdown of SSI aged/blind/disabled reconsideration applications received is as follows:

1/74	2	9/74	12	5/75	35
2/74	0	10/74	24	6/75	52*
3/74	2	11/74	27		
4/74	8	12/74	24		
5/74	16	1/75	23		
6/74	18	2/75	46		
7/74	17	3/75	27		
8/74	13	4/75	49		

* After June, 1975, only aged SSI reconsiderations are available, as follows:

7/75	80	10/75	52
8/75	89	11/75	54
9/75	50	12/75	69

INTERROGATORY #6

Q. Please state the total number of persons in Vermont who have requested hearings after they received an unfavorable Reconsideration determination on their SSI disability claims, and give the date that this figure is current to.

A. The total number of SSI hearing and appeal receipts for January 1974 - December 1975 is 212.

INTERROGATORY #7

Q. Please give a breakdown as to how many requests for hearing were filed in each month up to and including the most recent month that statistics have been compiled for.

A. The monthly breakdown of SSI hearing and appeal receipts is as follows:

1/74	0	9/74	1	5/75	8
2/74	0	10/74	15	6/75	5
3/74	0	11/74	7	7/75	19
4/74	3	12/74	15	8/75	13
5/74	3	1/75	13	9/75	7
6/74	6	2/75	6	10/75	14
7/74	10	3/75	7	11/75	24
8/74	7	4/75	11	12/75	18

INTERROGATORY #8

Q. Please give a breakdown as to how many of the hearings requested were for concurrent SSI-Social Security claims, and how many were for straight SSI claims.

A. The total number of title II hearings and appeal receipts for January 1974 - December 1975 is 322. The total number of title X hearing and appeal receipts during January 1974 - December 1975 is 212. There are no figures available for concurrent title II/ title XVI hearings requested.

INTERROGATORY #9

Q. Please state how many hearings have been held on SSI disability claims, and for each hearing held to date, please give the date of request for hearing, and the date that the hearing was held.

A. From June 3, 1975 to January 23, 1976, 39 hearings were held on SSI disability claims in Vermont.

Request for hearing

Hearing held

2/27/75	7/17/75
5/5/75	7/23/75
5/2/75	7/24/75
3/31/75	7/24/75 (postponed from 6/3/75)*
11/22/74	8/11/75
4/30/75	8/22/75**
4/3/75	8/26/75**
7/10/75	9/9/75**
12/18/74	9/25/75
2/25/75	10/8/75
3/7/75	10/9/75
4/28/75	10/9/75
5/28/75	10/9/75 (postponed from 7/23/75)*
7/15/75	10/9/75
7/8/75	10/15/75
8/12/75	10/15/75
6/4/75	10/16/75
6/25/75	10/16/75
6/27/75	10/16/75
7/23/75	10/16/75
7/9/75	10/17/75
9/17/75	10/17/75
8/22/75	10/30/75**
7/16/75	11/12/75
10/17/75	11/13/75**
1/15/75	12/18/75
5/28/75	12/18/75
9/10/75	12/23/75**
3/7/75	1/21/76
9/19/75	1/21/76
2/26/75	1/22/76
8/29/75	1/22/76
11/10/75	1/22/76
8/22/75	1/23/76
8/28/75	1/23/76
10/7/75	1/23/76
10/9/75	1/23/76
11/3/75	1/23/76
12/23/75	1/23/76

* At Plaintiff's request.

** On the record decision.

INTERROGATORY #10

Q. Please state if any of the hearings held and listed in answer to question #9 were held as a result of this lawsuit, and if so, state how many, and describe the process that resulted in the scheduling of such hearings.

A. To our knowledge, since June 3, 1975, three cases were heard because of litigation.

INTERROGATORY #11

Q. Please describe the administrative process that occurs from the date that a request for an SSI disability hearing is received until the date that the hearing is held, differentiating, if there is a difference, between concurrent SSI-Social Security claims and straight SSI claims.

A. The information previously furnished is correct. However, the following should be added to update the answer:

"From a study of cases which had not yet been assigned to an administrative law judge, it was learned that, in a number of cases, based upon evidence received in connection with the hearing request, the previous denial determination could be revised to a favorable determination.

Based on the study findings, a test procedure was instituted to permit a prehearing case review where new evidence is received with a request for hearing or where new evidence is available when the request is filed. Under this procedure, the component which made the prior denial determination reviews the case to determine if the new evidence received with the hearing request would result in a determination favorable to the claimant. If so, a revised favorable determination would be made. The procedure does not delay the scheduling of a hearing in the order in which a request is filed. However, where a favorable revised determination can be made, it permits an individual to receive a determination more quickly and be placed in benefit status more expeditiously than if the individual had to wait for a hearing to be held.

This will be published in regulations as a permanent procedure in the near future."

INTERROGATORY #12

Q. Please state who conducts the hearings for concurrent SSI-Social Security disability claims and who conducts hearings for straight SSI disability claims. Please state if different persons are used for hearing these two classes of cases and if so, please state why.

A. Section 2 of P.L. 94-202 enacted January 2, 1976, struck out the provisions in Section 1631(d)(2) of the Social Security Act, as amended, which were discussed in the previous response to this interrogatory with respect to appointment of hearing examiners, SSI. Section 3 of the same Public Law provides authority for persons appointed as hearing examiners to hear cases under other titles of the Act; and, further provides that persons previously appointed as hearing examiners shall, for a temporary period, be deemed to have been appointed under 5 U.S.C. 3105. It is expected that former hearing examiners, SSI, will begin hearing concurrent SSI-Social Security disability cases in the near future.

INTERROGATORY #13

Q. Please state how many persons are presently employed by the Social Security Administration to hear Vermont SSI disability applications, both the concurrent SSI-Social Security claims and the straight SSI claims, giving a breakdown into categories if one exists.

A. The answer previously given should be modified to read as follows:

One hearing office currently services Vermont -- Manchester, New Hampshire, which has three Administrative Law Judges and one Hearing Examiner, SSI as of January 9, 1976. It should be noted that one Administrative Law Judge transferred out of the Manchester hearing office in July 1975 leaving only 2 Administrative Law Judges until October 1975 when another Administrative Law Judge transferred in bringing the total back up to three Administrative Law Judges. During this time, the number of Hearing examiners, SSI, remained unchanged. (Since March 1975, some SSI hearings for Vermont are being serviced by the Springfield, Massachusetts hearing office).

INTERROGATORY #14

Q. Please state how many persons the Social Security Administration estimates it will need to employ to hear Vermont SSI disability applications.

A. There is no supplementation to the answer previously given.

INTERROGATORY #15

Q. Please state where these hearing officers are located, how they are assigned to hear Vermont SSI disability cases, and whether they are also assigned to hear SSI cases arising in other states, and if so, what other states.

A. There is no supplementation to the answer previously given.

INTERROGATORY #16

Q. Please state the relationship, if any, between the scheduling of hearings for Vermont SSI disability claims (both concurrent SSI-Social Security and straight SSI), and the scheduling of hearings for Vermont Social Security claims.

A. The procedure for scheduling hearings is the same for all programs. Cases are entered on the docket based on the date of the request for hearing. As set forth in our response to interrogatory #12 above, concurrent SSI and Social Security cases are also expected to be assigned to former hearing examiners in the near future.

INTERROGATORY #17

Q. Please state if any kind of hearing list is prepared for Vermont SSI disability hearings, and, if so, please state how such a list is prepared and how it operates in scheduling said hearings.

A. There is no supplementation to the answer previously given.

INTERROGATORY #18

Q. If the answer to question #17 was yes, please state if concurrent SSI-Social Security cases are combined on such a list with requests for hearings on straight Social Security cases, or state what, if any, relationship exists between the scheduling of hearings for concurrent SSI-Social Security cases and the scheduling of hearings for straight Social Security cases.

A. See our responses to Interrogatories #12 and 16, above. Otherwise, the answer previously given remains the same.

INTERROGATORY #19

Q. If there is a relationship between the scheduling of hearings for concurrent SSI-Social Security and the scheduling of hearings for straight Social Security cases, please state how many requests for hearings for straight Social Security cases were received by the hearing office that is responsible for holding Vermont hearings, for the years 1974, 1973, 1972 and 1971.

A. There is no supplementation to the answer previously given.

INTERROGATORY #20

Q. Please state the average number of days between the date of request for hearing and the date of hearing, for the years 1974, 1973, 1972 and 1971, for the hearings referred to in question #19.

A. There is no supplementation to the answer previously given.

INTERROGATORY #21

Q. If there is a relationship between the scheduling of hearings for concurrent SSI-Social Security cases and the scheduling of straight Social Security cases, please state if the answers to question #20 would be indicative of the average number of days to be expected between the request for hearing and the scheduling thereof, for concurrent SSI-Social Security cases. If the answer to question #20 would not be indicative, please state why it would not be indicative.

A. Extensive efforts have been underway to improve the processing times and to reach the objective stated in our response to interrogatory #23, below. The provisions of P.L. 94-202 will facilitate this process since it will provide more administrative law judges for hearing SSI and concurrent disability cases.

INTERROGATORY #22

Q. On page 4 of Defendant's Memorandum in Opposition to Motion for Temporary Restraining Order filed in this lawsuit, it was stated that the hearing for Carroll Barnett was expected to be held in January or February, 1975, and the hearing for Harold McBrine was expected to be held in March or April, 1975. Please state how these dates were arrived at.

A. There is no supplementation to the answer previously given.

INTERROGATORY #23

Q. Please estimate what the average time span between requests for SSI disability hearings and the scheduling thereof will be in Vermont for the years 1975 and 1976. Please state how such an estimate was arrived at.

no supplementation to the answer previously given other than the fact that we have a further objective that before the end of 1977, all hearings will be held within 90 days of the date of the hearing request.

INTERROGATORY #24

Q. Please state why, if such a reason exists, SSI disability cases can't be scheduled within the time span as non-disability cases.

A. There is no supplementation to the answer previously given.

INTERROGATORY #25

Q. In Defendant's Motion to Dismiss it was stated that future non-disability hearings will be provided within 90 days. Please state why disability cases can't be scheduled within this same 90 day time span.

A. There is no supplementation to the answer previously given.

INTERROGATORY #26

Q. Please state how many requests for hearings have been filed to date in Vermont on non-disability SSI cases.

A. There have been four SSI non-disability requests for hearing filed in Vermont from January 1974 through January 23, 1976.

INTERROGATORY #27

Q. Please give any statistics that have been compiled in whatever form available, to date, as to the reversal rates of SSI unfavorable Reconsideration decisions that are appealed to the hearing stage in Vermont, in this region, and nationally.

A. The reversal rates of SSI unfavorable reconsideration decisions nationally for Fiscal Year 1975 was 45.7 percent. For Region I (Boston) the reversal rate for the same period of time was 35.9 percent. No statistics are available on reversal rates on a State by State basis.

INTERROGATORY #28

Q. Please give any statistics that have been compiled in whatever form available, for the years 1974, 1973, and 1972, as to the reversal rates of Social Security unfavorable Reconsideration decisions that are appealed to the hearing stage in Vermont, in this region, and nationally.

A. There is no supplementation to the answer previously given.

INTERROGATORY #29

Q. Please state if any regulations have been proposed that will mandate the scheduling of SSI disability cases within any time span.

A. There is no supplementation to the answer previously given.

INTERROGATORY #30

Q. Please state or estimate when Maurice Washburn's hearing will be held.

A. There is no supplementation to the answer previously given.

INTERROGATORY #31

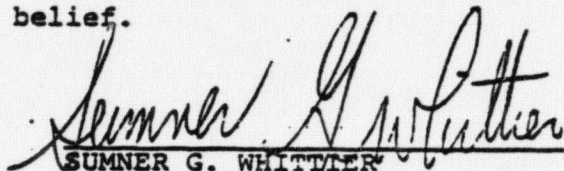
Q. Please identify who has provided the answers to the proceeding interrogatories.

A. Please refer to the verification below.

State of Maryland)
)ss
County of Baltimore)

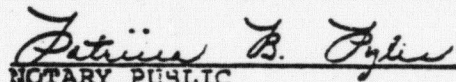
Sumner G. Whittier, being duly sworn, deposes and says that he is Acting Director of the Bureau of Supplemental Security Income for the Aged, Blind and Disabled of the Social Security Administration, Department of Health, Education and Welfare;

that as such officer he is authorized to and does make this verification for and on behalf of the Secretary of the Department of Health, Education and Welfare, acting by and through the Social Security Administration and the Bureau of Supplemental Security Income for the Aged, Blind and Disabled, Baltimore, Maryland; and that the foregoing Answers to Plaintiffs' Interrogatories are true to the best of his knowledge, information and belief.



SUMNER G. WHITTIER
ACTING DIRECTOR
BUREAU OF SUPPLEMENTAL SECURITY INCOME

Subscribed and sworn to before me
this 17th day of
February, 1976.



NOTARY PUBLIC

My Commission expires: July 1, 1978.

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CARROLL BARNETT, HAROLD
McBRINE, on behalf of
themselves and all others
similarly situated,

Plaintiffs,

v.

DAVID MATHEWS, Secretary of
the Department of Health,
Education and Welfare,

Defendant.

Civil Action No. 74-270

DEFENDANT'S SUPPLEMENTAL RESPONSES TO
PLAINTIFFS' INTERROGATORIES DATED
SEPTEMBER 15, 1975

Defendant has endeavored to be as responsive as possible in supplementing his answers to plaintiffs' interrogatories. According to the provisions of Rule 26(e) of the Federal Rules of Civil Procedure, as amended, and upon information that is furnished in good faith and on the basis of the best information available to the Social Security Administration, the Secretary of the Department of Health, Education and Welfare hereby supplements his answers to the plaintiffs' interrogatories in this action dated September 15, 1975, as follows:

INTERROGATORY #1

Q. For all of the named plaintiffs and intervenors to wit: Carroll Barnett, Harold McBrine, Walter Chapin, Maurice Washburn, Calvin Bassett, Greta Vincent, and Beverly Baird, please give the following information for each:

(a) The date of the initial SSI application; the date of the initial denial; the date reconsideration was requested; the date reconsideration was denied; the date a hearing was requested; the date a hearing was held.

A. The answers previously given are supplemented to include data regarding Harvey LaVigne and Sarah Sargent as follows:

Harvey LaVigne

SSI application filed	6/3/74
Initial denial	7/8/74 (date of determination apparently notified orally)
Reconsideration request filed	8/15/74
Reconsideration decision	File contains two identical notices, dated 10/10/74 and 12/12/74
Hearing request filed	1/8/75
Hearing held	2/3/76

Sarah Sargent

SSI application filed	2/28/75
Initial denial	5/5/75
Reconsideration request filed	6/16/75
Reconsideration decision	7/9/75
Hearing request filed	8/5/75

INTERROGATORY #2

Q. For all of the persons named in question #1, please describe all actions taken for each case between the request for a hearing, and the holding of the hearing. This should include but not be limited to: transmission of files (to and from where and when); development of the case (what was done to develop it and where and when this was done); gathering of additional medical evidence or attempts to gather such evidence (where this was done and when); and any other action taken relative to the handling of these cases.

A. The answers previously given are supplemented to include data regarding Harvey LaVigne and Sarah Sargent as follows:

Harvey LaVigne

Hearing request filed	1/8/75
File received in development center	1/13/75
File received in hearing office	7/7/75
Assigned to administrative law judge	9/8/75
Notice of hearing on 2/3/76 mailed	1/21/76
Hearing held*	2/3/76

Sarah Sargent

Hearing request filed	8/5/75
File received in development center	9/24/75
File received in hearing office	10/1/75

... Additional medical evidence to be submitted by plaintiffs attorney prior to hearing decision being rendered.

State of Maryland)
) ss
County of Baltimore)

Sumner G. Whittier, being duly sworn, deposes and says that he is Acting Director of the Bureau of Supplemental Security Income for the Aged, Blind and Disabled of the Social Security Administration, Department of Health, Education and Welfare; that as such officer he is authorized to and does make this verification for and on behalf of the Secretary of the Department of Health, Education and Welfare, acting by and through the Social Security Administration and the Bureau of Supplemental Security Income for the Aged, Blind and Disabled, Baltimore, Maryland; and that the foregoing Answers to Plaintiff's Interrogatories are true to the best of his knowledge, information and belief.

SUMNER G. WHITTIER
ACTING DIRECTOR
BUREAU OF SUPPLEMENTAL SECURITY I

Subscribed and sworn to before me this
17th day of February, 1976

Patricia B. Tyler
NOTARY PUBLIC

My Commission expires: July 1, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

CARROLL BARNETT; HAROLD McBRINE,
on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

F. DAVID MATHEWS, Secretary of
the Department of Health,
Education and Welfare,

Defendant.

Civil Action No. 74-270

STIPULATION OF FACTS

Now come the above parties, by their respective attorneys, to
Stipulate and Agree to the following facts. The parties further Stipulate
that the Interrogatories and depositions shall be admissible as evidence
in this matter. For purposes of convenience, references to the depositions
in this Stipulation of Facts shall be as follows: deposition of Raymond
Sinibaldi shall be referred to as D-1; deposition of Robert Hermann
shall be referred to as D-2; deposition of Vincent McGinn shall be
referred to as D-3.

1. Carroll Barnett filed an application for Supplemental Security
Income (SSI) disability benefits (as provided for under Title XVI of
the Social Security Act) on February 6, 1974, and was initially denied
benefits on March 22, 1974. He filed a request for reconsideration on
April 29, 1974 and was denied on reconsideration on May 31, 1974. He
requested a hearing on June 24, 1974, and his hearing was held on December 10, 1974,
which resulted in a decision reversing his denial and finding him eligible for benefits.

2. Harold McBaine filed an application for SSI disability benefits
on May 9, 1974, and was initially denied benefits in July, 1974. He
filed a request for reconsideration on July 22, 1974, and was denied on
reconsideration on July 31, 1974. He requested a hearing on August 19,
1974, and his hearing was held on December 24, 1974, which resulted in a
decision reversing his denial and finding him eligible for benefits.

3. Walter Chapin filed an application for SSI disability benefits on April 12, 1974, and was initially denied benefits on May 13, 1974. He filed a request for reconsideration on November 12, 1974, and was denied on reconsideration on December 10, 1974. He requested a hearing on December 13, 1974, and his hearing was held on March 19, 1975, which resulted in a decision reversing his denial and finding him eligible for benefits.

4. Maurice Washburn filed an application for SSI disability benefits on April 12, 1974, and was initially denied benefits on May 23, 1974. He filed a request for reconsideration on July 26, 1974. He filed a request for reconsideration on July 26, 1974, and was denied on reconsideration on October 3, 1974. He requested a hearing on October 16, 1974, and his hearing was held on February 10, 1975, which resulted in a decision reversing his denial and finding him eligible for benefits.

5. Calvin Bassett filed an application for SSI disability benefits on May 31, 1974, and was initially denied benefits on September 29, 1974. He filed a request for reconsideration on October 2, 1974, and was denied on reconsideration on October 10, 1974. He requested a hearing on October 17, 1974, and his hearing was held on March 19, 1975, which resulted in a decision upholding the denial of his claim for benefits. A request for Appeals Council review was filed on June 23, 1975, and the Appeals Council upheld the denial of benefits, and no further appeal was taken.

6. Greta Vincent filed an application for SSI disability benefits on February 12, 1974, and was initially denied benefits on March 19, 1974. She filed a request for reconsideration on March 26, 1974 and was denied on reconsideration on April 9, 1974. She requested a hearing on October 18, 1974, and her hearing was held on May 13, 1975, which resulted in a decision reversing her denial and finding her eligible for benefits.

7. Beverly Baird filed an application for SSI disability benefits on October 29, 1974, and was initially denied benefits on December 24, 1974. She filed a request for reconsideration on February 7, 1975, and was denied on reconsideration on May 1, 1975. She requested a hearing on May 23, 1975 and a

reversing her denial and finding her eligible for benefits.

8. Harvey LaVigne filed an application for SSI disability benefits on June 3, 1974, and was initially denied benefits on July 8, 1974. He filed a request for reconsideration on August 15, 1974, and was denied on reconsideration by notices dated October 10, 1974 and December 12, 1974. He requested a hearing on January 8, 1975 and his hearing was held on February 3, 1976. An additional consultative examination was held on March 24, and the hearing officer is awaiting the report of that examination.

9. Sarah Sargent filed an application for SSI disability benefits on February 28, 1975, and was initially denied benefits on May 5, 1975. She filed a request for reconsideration on June 16, 1975 and was denied on reconsideration on July 9, 1975. She requested a hearing on August 5, 1975. The case was assigned to a hearing officer on May 5, 1976. On May 13, Ms. Sargent's representative requested an additional consultative examination to be done prior to a hearing, and such an examination has been requested by the hearing officer.

10. The administrative appeals process for SSI claims involves an initial application for benefits and an initial decision. If an individual is denied benefits at this level, he may request reconsideration. The decisions on the issue of disability on the initial and reconsideration level are made by the Disability Determination Service of the respective states. (D-1, p. 67).

11. If an individual is denied at the reconsideration level, he may request a hearing, which is held by the Bureau of Hearings and Appeals. If denied benefits at the hearing level, an individual may request review by the Appeals Council, and if denied by the Appeals Council further review may be had by initiating an action in the United States District Court. (D-1, p. 67, D-2, p. 67).

12. As of December, 1975, there had been 3,025 SSI (or Title XVI, from Title XVI of the Social Security Act) disabled/blind applications in Vermont, and as of June, 1975, there had been 2,252 concurrent SSI/Title II applications (applications for both SSI disabled or blind benefits and Disability Insurance Benefits under Title II of the Social Security Act) in Vermont. (Interrogatory #1, Supplemental Response.)

13. As of July 30, 1975, there were 1,722 initial approvals of SSI disability/blindness claims, and 1,428 initial denials of SSI disability/blindness claims in Vermont. (Interrogatory #2, Supplemental Response.)

14. As of June, 1975, there had been 395 requests for reconsideration for all SSI claims since January 1974 (Interrogatory #3, Supp.), and as of December, 1975, there had been 212 requests for hearings for SSI claims in Vermont since January 1974. (Interrogatory #6, Supplemental Response).

15. The monthly breakdown of SSI hearing requests in Vermont between January, 1974 and December, 1975 is as follows:

1/74	0	9/74	1	5/75	8
2/74	0	10/74	15	6/75	5
3/74	0	11/74	7	7/75	19
4/74	3	12/74	15	8/75	13
5/74	3	1/75	13	9/75	7
6/74	6	2/75	6	10/75	14
7/74	10	3/75	7	11/75	24
8/74	7	4/75	11	12/75	18

(Interrogatory #7, Supp. Response.)

16. As of January 23, 1976, there had been 100 hearings held on SSI disability claims in Vermont. (Interrogatory #9 and Supplemental Response.) The following is a breakdown of these hearings in terms of date of request for hearing and date hearing was held:

<u>Date of request for hearing</u>	<u>Date hearing held</u>
03/21/74	12/12/74
04/05/74	12/11/74
04/17/74	11/18/74-Hearing first scheduled to be held 08/20/74. Individual requested postponement-Hearing rescheduled and held 11/18/74.
04/23/74	10/02/74
05/06/74	12/12/74
05/14/74	10/02/74
06/12/74	12/11/74
06/18/74	12/12/74
06/23/74	12/10/74
06/27/74	12/12/74
06/27/74	12/11/74
07/16/74	12/10/74
07/23/74	12/12/74
07/31/74	12/12/74
08/19/74	12/10/74
08/30/74	12/10/74
08/30/74	12/11/74
09/04/74	12/12/74
09/25/74	12/12/74
09/26/74	12/11/74
09/30/74	12/12/74
10/15/74	12/11/74
10/24/74	02/10/75

Request for hearing

Hearing held

11/14/74
12/13/74
01/14/75
06/05/74

03/17/75
03/18/75
03/18/75
03/18/75-Hearing had
been scheduled twice before but was postponed
on each of the earlier dates at claimant's
request.

12/13/74
10/15/74

03/19/75
03/19/75-Decision on
the record.

10/17/74
01/21/75
10/02/74
06/27/74

03/19/75
03/19/75
03/20/75
03/20/75-Hearing had
been scheduled twice before but was postponed
on each of the earlier dates at claimant's
request.

11/19/74
11/05/74
12/16/74
12/16/75
07/31/74
07/01/74
06/04/74
09/25/74
10/03/74
07/31/74
01/14/75
07/01/74
07/17/74
11/07/74
02/07/75
03/11/75
03/11/75
02/14/75
03/07/75
10/18/74
10/23/74
12/06/74
02/03/75
02/07/75
03/18/75
03/25/75
03/31/75
02/27/75
05/05/75
05/02/75
07/17/75

03/20/75
03/20/75
03/21/75
03/21/75
03/12/75
03/25/75
03/10/75
03/10/75
03/11/75
03/12/75
03/18/75
03/25/75
03/26/75
05/06/75
05/07/75
05/07/75
05/07/75
05/08/75
05/08/75
05/13/75
05/14/75
05/28/75
05/28/75
05/28/75
06/03/75
06/03/75
06/03/75
07/17/75
07/23/75
07/24/75
07/24/75 (postponed from
6/3/75)*

11/22/74
04/30/75

08/11/75
08/22/75 On the record
decision.

04/03/75

08/26/75 On the record
decision.

07/10/75

09/09/75 On the record
decision.

12/18/74
02/25/75
03/07/75

09/25/75
10/08/75
10/09/75

* At Plaintiff's request.

Request for hearingHearing held

04/28/75	10/09/75
05/28/75	10/09/75 (postponed from 7/23/75) *
07/15/75	10/09/75
07/08/75	10/15/75
08/12/75	10/15/75
06/04/75	10/16/75
06/25/75	10/16/75
06/27/75	10/16/75
07/23/75	10/16/75
07/09/75	10/17/75
09/17/75	10/17/75
08/22/75	10/30/75 On the record decision.
07/16/75	11/12/75
10/17/75	11/13/75 On the record decision.
01/15/75	12/18/75
05/28/75	12/18/75
09/10/75	12/23/75 On the record decision.
03/07/75	01/21/76
09/19/75	01/21/76
02/26/75	01/22/76
08/29/75	01/22/76
11/10/75	01/22/76
08/22/75	01/23/76
08/28/75	01/23/76
10/07/75	01/23/76
10/09/75	01/23/76
11/03/75	01/23/76
12/23/75	01/23/76

(Interrogatory #9, Supplementary Response)

17. Twenty-one hearings were held shortly after the institution of this lawsuit. It was the defendant's opinion that the court should have an opportunity to examine and rule on the merits of the suit rather than issue a temporary order based on incomplete data, and for that reason many of the 21 hearings mentioned were expedited. Since June 3, 1975, three cases were heard on an expedited basis because of litigation.

(Interrogatory #10 and Supplementary Response).

18. When a request for a hearing is filed in an SSI case, either SSI (Title XVI) only claims or concurrent Title XVI-Title II claims, it is sent to the Development Center, which is located in Boston, Massachusetts.

(Interrogatory #11; D-1, p. 10-11.)

19. The Boston Development Center plays no role in straight Title II cases (Social Security), and all development in those cases is done by the administrative law judges (D-1, p. 49-50).

* At Plaintiff's request.

20. The Development Center develops all appeals by putting the case together and getting it ready to be sent to the hearing officer. Development includes obtaining additional medical (in the form of existing doctor's or hospital reports) or other evidence; getting together all the necessary parts of the file, preparing an analysis of the case, and completing the clerical preparation of the case so that the hearing officer can look at the file without having to do the above tasks. The Development Center, however, does not have the authority to request a new or independent consultative examination. (Interrogatory #11; D-1, p. 15-17, 20, 34-35, 38.)

21. According to the Director of the Development Center, the most time-consuming part of the development process in the Development Center is the obtaining of additional medical evidence such as existing doctors reports or hospital reports not in the file. (D-1, p. 20, 21, 36.)

22. Based upon a study by the Director of the Development Center, approximately 48% of all appeals coming into the Center require additional development by Center personnel, with the obtaining of additional existing medical evidence being the main factor required in these cases. (D-1, p. 19-20.)

23. According to an estimate by the Development Center Director, it takes, on the average, approximately eight (8) days between the time the Social Security district office receives a request for a hearing, until the file is sent to the Development Center. (D-1, p. 13.)

24. The Director of the Development Center has stated that if a case doesn't require any additional development, it should take between 5-10 days to process at the Development Center. (D-1, p. 25.)

25. Based upon a study made by the Director of the Development Center, the mean time that a case remained at the Development Center was 36 days, with a median time of 31 days, and a range of 5 to 139 days. (D-1, p. 23.)

26. Cases are generally handled at the Development Center on a first-come, first-served basis, by the date of the hearing request. (D-1, p. 30.)

27. There is a policy guideline or goal that a disability case should not remain in the Development Center more than 45 days. (D-1, p. 32.)

28. When a case is received by the Development Center, it is reviewed by an analyst the same day or the following day. (D-1, p. 36).

29. The Director of the Development Center was of the opinion that the Center speeds up the hearing process, by getting all the material together at a central location, before forwarding the file to a hearing officer. (D-1, p. 37).

30. Based on figures maintained by the Boston Development Center, as of January 2, 1976, there were approximately 302 pending cases at the Development Center. Figures for previous months were: 310; 241; 304; 270; 255; 240; and 280. At the time of the deposition (January 26, 1976), there were approximately 250 pending cases (D-1, p. 30-31, 39, 50).

31. Initially the Development Center had seven analysts, four clerical employees, and the Director, but by the end of 1975 two of the analysts had left the center. (D-1, p. 17).

32. Because many of the pending cases were awaiting additional information from other sources, the addition of more personnel to the Development Center would not significantly reduce the number of pending cases, although some delay factor is raised by a shortage of personnel. (D-1, p. 39-40, 51-52, 58).

33. According to the Director of the Development Center, the Vermont Disability Unit which is the state unit responsible for actually obtaining additional medical evidence gave the Development Center the best service of any state in the region, which consists of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut. (D-1, p. 36, 60).

34. Based upon figures compiled by the Director of the Boston Development Center, for the calendar year 1975, the mean processing time from date of request for hearing to date of decision was 136 days for SSI (Title XVI) only cases, and 276 days for concurrent Title XVI-Title II cases. (D-1, p. 42-43).

35. Normally, according to the Director of the Development Center, no additional development would be required (which would be within the Center's authority to undertake) in cases that have passed through the Development Center (D-1, p. 54), and Vincent Paul McGinn, who was the SSI Hearing Examiner, for Vermont, found the cases from the Development

that fairly often additional consultative medical examinations are required after a hearing. Judge Hermann has stated that additional consultative examinations are required, ^{after a hearing,} in 80-90% of the cases. Judge Hermann's workload includes Title II, Title XVIII and other types of Social Security Act cases. His SSI cases have been nearly all concurrent cases (D-2, p. 35, D-3, p. 5).

36. The Manchester, New Hampshire office of the Bureau of Hearings and Appeals serves Vermont and New Hampshire, and has four (4) hearing officers at present. (D-2, p. 8).

37. At the time this lawsuit was instituted, and until the enactment of Public Law 94-202, enacted January 2, 1976, there were two separate categories of hearing officers handling SSI claims, SSI Hearing Examiners and Administrative Law Judges. The SSI Hearing Examiners could by law only hear straight SSI cases, while the Administrative Law Judges would hear concurrent Title II-Title XVI cases, as well as straight Title II cases. (Interrogatory #12; D-2, p. 11-12).

38. In the Manchester office, there had been three Administrative Law Judges and one (1) SSI Hearing Examiner, the SSI Hearing Examiner being Vincent Paul McGinn (D-2, p. 8, 11-12; D-3, p. 4), and all straight SSI (Title XVI) cases had been handled by Mr. McGinn (D-3, p. 8), and all concurrent Title XVI-Title II claims had been handled by the 3 administrative law judges. (D-2, p. 12).

39. Up until the enactment of Public Law 94-202, concurrent Title XVI (SSI)-Title II cases were scheduled and docketed in the same manner and together with straight Title II cases. (D-2, p. 20-21).

40. On March 3, 1976, under the provisions of Public Law 94-202, the Secretary of HEW authorized SSI Hearing Examiners to hear concurrent Title XVI-Title II cases (Interrogatory #12; D-2, p. 54), and in the Manchester office Mr. McGinn will now continue to hear all of the SSI (Title XVI) only cases, and additionally Judge Hermann has stated that he plans to assign all concurrent Title XVI-Title II cases to Judge McGinn. (D-2, p. 57).

41. When Mr. McGinn was hearing SSI only cases, he had no difficulty in scheduling his cases for hearing in a very short period of time, and his cases would be heard within 30 days to 6 weeks after he received the hearing request. (D-3, p. 8-10, 14-15).

42. At the time of the enactment of Public Law 94-202, Mr. McGinn had only four (4) cases that had not been scheduled, and when he finished his duties of just hearing straight SSI cases he was up to date on his cases, and had been current for 6-12 months on his caseload. (D-3, p. 11, 14; D-2, p. 55-56).

43. According to the hearing officers in the Manchester hearing office, there was no backlog of SSI only cases, and the backlog was with the concurrent Title XVI-Title II cases (D-2, p. 55; D-3, p. 14), and the purpose of the new Law was to meet the backlog problem of all Social Security cases (Title XVI, Title II, etc.). (D-2, p. 55).

44. When hearing requests are received by the Manchester office of the Bureau of Hearings and Appeals, they are processed by the docket clerk, and assigned for hearing on a first-come, first-served basis. (D-2, p. 15).

45. Cases are put on the docket within one or two days after arrival at the hearing office, and cases then await assignment to a judge. (D-2, p. 17-18).

46. According to the practice in the Manchester Hearing Office cases are assigned to judges once or twice each four week reporting period based on the judge's existing caseload, and until they are assigned to a judge, generally nothing would be done to the case. (D-2, p. 18-20).

47. In the Manchester Hearing Office at present, (March 1976), it would be approximately three or four months before a case is assigned to a judge after it has been placed on the docket, but this time is diminishing. (D-2, p. 18).

48. After cases are assigned to judges, they plan their trips and hearings. (D-2, p. 23).

49. According to Judge Hermann, as of August 15, 1975, there were 682 unassigned cases in Manchester, of which 124 were SSI (including concurrent) cases. As of March 9, 1976, there were 373 unassigned cases, of which 68 were SSI (including concurrent) cases. (D-2, p. 31).

50. For the period January 1, 1975 - January 1, 1976, the Manchester office received 850 requests for hearings, of which more than 25% would have been for SSI cases (concurrent and SSI only). (D-2, p. 44-45).

51. For the period... disposed of 236 cases (Title II, Title XVIII, and concurrent SSI-Title II) and Judge Pierce disposed of 244 cases. They were the only administrative law judges there for the whole year. The SSI Hearing Examiner disposed of 83 cases during that period. (D-2, p. 46).

52. There is a suggested standard of disposing of 26 cases per month per judge (D-2, p. 47), and Judge Hermann hopes to dispose of about 25 cases per month (D-2, p. 62-63).

53. Judge Hermann tries to schedule for hearing between 20-30 cases per month (D-2, p. 48-49).

54. Judge Hermann assigns himself between 20-25 cases per month (D-2, p. 50), and, as of March 4, 1976, he had approximately 150 cases assigned to himself awaiting the scheduling of hearings (D-2, p. 50).

55. In the Manchester office according to Judge Hermann, in March of 1975, concurrent Title XVI-Title II cases that were being assigned were over one year awaiting assignment. As of March 4, 1976, September, 1975 concurrent cases were the oldest such cases being assigned for Vermont (D-2, p. 52-53).

56. As of March 4, 1976, for concurrent cases (Title XVI-Title II) there was a 6-7 month lag between hearing request date and the assignment of the case to a hearing officer (D-2, p. 65).

57. Everything else being equal, Judge Hermann would hope that within 6 months, there would be a 2-4 month lag between hearing request date and the assignment of the case to a hearing officer, for concurrent cases. (D-2, p. 65).

58. Judge Hermann's goal would be to hear concurrent cases within 2 to 3 months after his office receives the request for hearing. (D-2, p. 66-67).

59. There are no plans to increase the number of hearing officers in the Manchester office. (Interrogatory #14.).

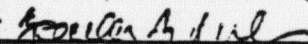
60. When the Portland Hearing Office opened in January 1976, it took over the jurisdiction of the Request for Hearing cases filed in Maine. That service area had accounted for nearly half of the workload in the Manchester office. The staffing in Manchester did not change,

which means they now have the same amount of people to hear about half the number of cases they had to hear previously. This, in connection with the fact they will no longer have to travel to Maine to hold hearings, means they will be able to give better service to the claimants in Vermont. (D-2, pp. 8, 51.).

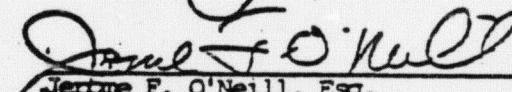
61. The objective of the Social Security Administration was, by September 30, 1976, to have all SSI disability hearings held within 100 days of the date of request for hearing, but this was dependent on a number of variables, largely funding and staffing (Interrogatory #23). The objective for the end of 1977 is to hold all hearings within 90 days of the date of hearing request. (Interrogatory #23 supplementary answer).

62. The national reversal rate of SSI unfavorable reconsideration decisions after a hearing is held, for 1975, was 45.7%. For Region I (Boston), the reversal rate was 35.9%. (Interrogatory #27, supplementary answer).

Dated at St. Johnsbury, Vermont, this 12th day of July, 1976.


Zander B. Rubin, Esq.
Vermont Legal Aid, Inc.
Attorneys for Plaintiffs

Dated at Rutland, Vermont, this 1st day of July, 1976.


Jerome F. O'Neill, Esq.
Assistant United States Attorney
Attorney for Defendant

CARROLL BARNETT; HAROLD McBRINE
on behalf of themselves and all
others similarly situated,

▼

**F. DAVID MATHEWS, Secretary of
the Department of Health,
Education and Welfare,**

AFFIDAVIT OF JAN J. SAGETT

County of Arlington)
State of Virginia) ss

1. I am the duly appointed Deputy Director of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education, and Welfare.

2. Currently, the Bureau of Hearings and Appeals is facing the problem of a nationwide backlog in requests for hearings. The causes of this backlog problem are essentially four-fold - 1) a very large one-time volume of claims for Black Lung benefits under the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. 901 et seq., and the introduction of Title XVI of the Social Security Act, Supplemental Security Income for the Aged, Blind and Disabled, 42 U.S.C. 1381 et seq. at a time when the program administered under Titles II and XVIII of the Social Security Act (Old Age, Survivors, Disability and Health Insurance) was experiencing rapid growth; 2) a lack of flexibility in the use of three distinct corps of legislatively created hearing officers (Title II and XVIII Administrative Law Judges, Black Lung Administrative Law Judges, and SSI Hearing Examiners); 3) difficulties encountered in appointing additional hearing officers; and 4) the nature of the disability inquiry. By April 1975, the national hearing backlog had reached an all time high of over

3. After preliminary study of this situation, the Social Security Administration made a concerted effort to reduce the backlog. Initiatives were undertaken beginning in January 1975 to reduce the backlog and processing times.

4. One of the first initiatives taken was to identify areas where cases could be processed more quickly by the addition of support personnel and/or more sophisticated equipment. Since January 1975, 428 permanent support personnel have been added to the hearing offices. (Eighteen were added to the offices in Region I, which includes Vermont). In addition, the Bureau upgraded the quality of office equipment available to hearing officers, including the placement of over 90 automatic magnetic card typewriters, so that decisions might be rendered more quickly. The first step of an automated case control and case location system was installed and will, when installation is complete, allow for greater management control over the caseload and hopefully reduce the volume of reporting required by the hearing officers.

5. To further relieve the hearing officers of non-judicial functions and/or functions unrelated to the hearing of cases, the Bureau enlarged the professional support staff available to them. Initially, experienced central office hearings and appeals analysts were detailed to the hearing offices to assist hearing officers in drafting decisions and obtaining needed medical evidence. In addition, a new program was instituted to hire recent law school graduates and attorneys to continue and expand this professional staff support.

6. This latter program, referred to as the Staff Attorney Support Program, was instituted in August 1975 with 160 law graduates attending in-depth training sessions throughout the country. Currently, there are over 250 of these Staff Attorneys. There

are presently three Staff Attorneys in the Manchester, New Hampshire office, which has primary responsibility for Vermont. The Staff Attorneys do not, of course, function as adversary counsel for the government. Rather, they serve a function analogous to that of a judicial clerk. The initial results of this program are quite favorable in terms of increasing the productivity of the hearing officers to whom the legal assistants have been assigned.

7. In addition, because experience had shown that a substantial number of reversals at the hearing level occur as a result of a deterioration in the claimant's condition or the receipt of new and material evidence, an "informal remand" procedure was devised in order to award benefits, if possible, without the necessity for a hearing. Accordingly, pending hearing requests were screened for the possibility of immediate favorable action or to obtain additional evidence which could possibly result in such action. These were processed promptly, and through May 1976 favorable action had been taken in over 7,800 cases. Also, steps have been taken to expedite favorable hearing decisions.

8. Realizing that the Bureau of Hearings and Appeals was experiencing a significant problem, Congress held extensive hearings during calendar year 1975. As a result of these hearings, Congress passed H. R. 10727, which was signed into law by the President on January 2, 1976, as P.L. 94-202. This law has the effect of permitting the Secretary of Health, Education and Welfare to consolidate our three existing corps of hearing officers into one corps which can deal flexibly with the hearing workload. Beginning in March 1976, pursuant to this law, the former SSI Hearing Examiners were able to hear cases under titles II and XVIII as well as under title XVI, and were converted to administrative law judges (temporary). With the completion of the Black Lung program on April 30, 1976, the former Black Lung Administrative Law Judges were also converted to ALJs(T).

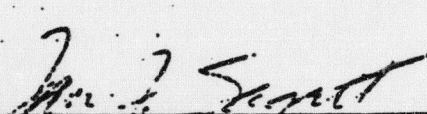
9. Nationwide, these initiatives have resulted in significant improvements in production and in reductions in the hearing backlog.

The average number of dispositions per hearing officer increased from 14.8 for the period September 13, to October 14, 1974 to 23 for January and February 1976. For March, April, and May the average was 22. (This decrease may have been due to the process of transferring and training the ALJs(T) for their new role in hearing cases under other titles of the Act). From April 26, 1975, to June 19, 1976 the backlog was reduced at a rate of about 1,800 cases per month, from over 113,000 to 87,860. The number of cases pending over 180 days was reduced from over 47,000 in June 1975 to about 31,500 as of June 19, 1976.

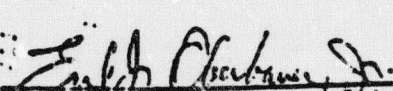
10. Despite this progress, certain factors have caused us to reconsider our earlier expectations regarding the rate at which the backlog will be reduced. First, total hearing requests for FY 1976 have been 25% above estimated levels. (In Region I, which includes Vermont, the total number of hearing requests for titles II, XVI, and XVIII increased from 1,328 for the period January to March 1975, to 1,668 for the same period in 1976. Although the hearing officers' case production for the latter period had increased by 58% from 924 to 1,457, it was not enough to keep pace with the receipts). Second, because receipts in Black Lung cases continued at a higher level than estimated (1,000 estimated for FY 1976, 4,800 received), we were compelled to retain the Black Lung Administrative Law Judges in the Black Lung program longer than originally planned, and thereby did not have them available as soon to process title II and XVI cases. When converted, the Black Lung Administrative Law Judges, like the converted SSI Hearing Examiners, had to be trained in new areas of the law. A learning curve is to be expected before they become fully productive. Our experience with GS-15 administrative law judges has shown a learning curve of about 9 months, and although we are trying to reduce this we do not know whether it can be done. Moreover, since most of the Black Lung Administrative Law Judges were stationed in areas where there were no permanent BHA offices, they had

to be transferred to other offices, causing further disruptions in production. Finally, from the standpoint of total professional staffing in the hearing offices, we had anticipated that 728 administrative law judges and 400 staff attorneys would be on duty as of July 1, 1976. However, as of June 13, 1976, there were 641 hearing officers and 253 staff attorneys on duty. Thus, we have reassessed our earlier expectations that by September 30, 1976, all hearings would be held within 100 days, and within 90 days by the end of 1977, and have concluded that it is not possible at present to make an accurate prediction of the dates by which these will be achieved.

11. Due to the present backlog of over 5,000 cases in Region I, we plan to have two groups of administrative law judges from outside the Region hear cases in Region I on a temporary basis. The two groups will be sent in sequentially. The first will include 23 administrative law judges and will hear 900-1,000 cases, which should reduce the backlog and the processing times for the Region by about 20%. The second group will include 25 administrative law judges, and will also hear 900-1,000 cases. This group should reduce the backlog and the processing times by another 20%. We expect this action to lessen the hearing delays in Vermont.


JAN J. SAGITT, Deputy Director
Bureau of Hearings and Appeals
Social Security Administration
Department of Health, Education
and Welfare

Subscribed and sworn to before me
this 15th day of July, 1976.


NOTARY PUBLIC, County of Arlington
State of Virginia

(My Commission Expires May 10, 1980)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

CARROLL BARNETT; HAROLD McBRINE,
on behalf of themselves and all
others similarly situated,

Plaintiffs

v.

F. DAVID MATHEWS, Secretary of
the Department of Health,
Education, and Welfare,

Defendant

Civil Action No. 74-270

SUPPLEMENTAL RESPONSE TO PLAINTIFFS' INTERROGATORIES
DATED JANUARY 27, 1975

Defendant, in an endeavor to be completely responsive to plaintiffs' interrogatories, hereby supplements his answer to plaintiffs' interrogatory number 23 as follows:

INTERROGATORY NO. 23

Q. Please estimate what the average time span between requests for SSI disability hearings and the scheduling thereof will be in Vermont for the years 1975 and 1976. Please state how such an estimate was arrived at.

A. In previous responses to this interrogatory, the defendant stated:

(1) On June 24, 1975:

The objective by the end of fiscal year 1976 (September 30, 1976) is to reduce the backlog to no more than 90 days and to have all hearings held within 100 days of the date of the request for hearing.

Processing time will be reduced as backlogs are reduced. The rate of progress, however, is dependent on a number of variables—largely funding and staffing.

(2) On February 17, 1976:

There is no supplementation to the answer previously given other than the fact that before the end of 1977, all hearings will be held within 90 days of the date of the hearing request.

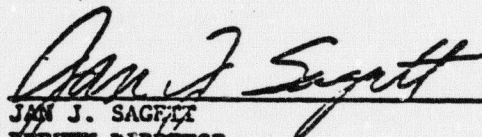
At this time, it is necessary to supplement those previous responses because, as stated before, "The rate of progress...is dependent on a number of variables..." and there have been, in fact, a number of variables which have arisen since the last estimate was given in response to plaintiffs' request for the average time spent between requests for SSI disability hearings and the scheduling thereof. Those variables have caused the Bureau of Hearings and Appeals to conclude that it should not at this point attempt to estimate the date at which its objectives will be met.

The main variable is the number of hearing requests received, which nationwide for FY 1976 was 25% above estimated levels. In Region I, which includes Vermont, total hearing requests for titles II, XVI, and XVIII during the first quarter of calendar year 1976 were 1,668, as opposed to 1,328 for the same period in 1975. During the second quarter of calendar year 1976 the total was 1,932, as opposed to 1,155 for the second quarter of 1975. At this time, we do not know whether or for how long this significant increase in hearing requests will continue. Another variable is the effect of two recent changes in the Manchester, New Hampshire Hearing Office, both of which, on the other hand, are expected to lessen the delays in Vermont. The previous SSI hearing examiner in the Manchester office has, as of March 1976, been made a temporary ALJ. Whereas he previously heard only title XVI (SSI) cases, now, pursuant to P. L. 94-202, he is hearing both title XVI-only and title XVI-title II concurrent cases. Also, that part of the caseload of the Manchester office relating to cases from Maine claimants is now being heard in our new Portland, Maine Hearing Office. Because the Manchester staff has remained the same, this change in jurisdiction should impact favorably on the Vermont caseload. However, it is difficult at this time to measure the precise impact of these changes, and it is thus impossible at present to predict when the above objectives will be achieved.

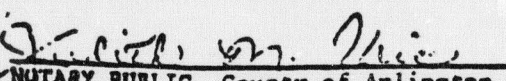
It should be noted that BHA's concern over the hearing delay situation in Region I led the Bureau, in July 1976, to detail 23 ALJs to the Region to help reduce the number of cases pending hearing. These ALJs are hearing 900-1,000 cases. It is anticipated that this will decrease by about 20% the over 5,000 case backlog which existed in Region I last July. As a result, by August 31, 1976, all but eight of the Vermont cases pending in the Manchester office had been assigned to administrative law judges, and are expected to be heard by the first week in November. Of the eight remaining cases, four involve disability issues. The oldest of these was filed on July 30, 1976. In addition, the Springfield, Massachusetts office had only one Vermont case pending as of September 1, 1976. The first group of ALJs will be followed by a second group of some 25 ALJs, who will hear a similar number of cases. This move should help stabilize the situation in Vermont, as well as Region I as a whole. Thus, the Social Security Administration is continuing its efforts to improve the hearing delay situation.

State of Virginia)
) ss
County of Arlington)

Jan J. Sagett, being duly sworn, deposes and says that he is the Deputy Director of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education, and Welfare; that as such officer he is authorized to and does make this verification for and on behalf of the Secretary of the Department of Health, Education, and Welfare, acting by and through the Social Security Administration and the Bureau of Hearings and Appeals; and that the foregoing supplemental Response to Plaintiffs' Interrogatories dated January 27, 1975 is true to the best of his knowledge, information and belief.


JAN J. SAGETT
DEPUTY DIRECTOR
BUREAU OF HEARINGS AND APPEALS

Subscribed and sworn to before me
this 15th day of September, 1976


NOTARY PUBLIC, County of Arlington,
State of Virginia

My Commission expires: December 14, 1978
COMMISSIONED JUDITH L. McLELL

097

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

CARROLL BARNETT; HAROLD McBRINE)
on behalf of themselves and all)
others similarly situated,)

Plaintiffs)

v.)

CIVIL ACTION NO. 74-270)

F. DAVID MATHEWS, Secretary)
of the Department of Health,)
Education, and Welfare,)

Defendant)

AFFIDAVIT OF JAN J. SAGETT

County of Arlington)
State of Virginia) ss

I, Ja. J. Sagett, being duly sworn, say:

(1) I am the duly appointed Deputy Director of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education, and Welfare.

(2) In order to provide current information concerning some of the matters discussed on page 3 of my "Supplemental Response to Plaintiffs' Interrogatories Dated January 27, 1975," which was dated September 15, 1976, the BHA Hearing Offices servicing Vermont were recently contacted. As of January 11, 1977, in the Manchester, New Hampshire office, all but four SSI cases had been assigned to an administrative law judge. The request for hearing in the oldest of the unassigned cases, all of which are concurrent, was filed on November 9, 1976. In addition, there were four cases which had been referred to the State agency under the informal remand procedure. In the oldest of these, which is a concurrent case, the request for hearing was filed on October 12, 1976. This hearing request will be dismissed because the State agency has taken favorable action on the claim.

Of the three remaining cases, all of which are title XVI only, the earliest hearing request was filed on December 7, 1976.

As of January 11, 1977, the administrative law judges in Manchester were hearing cases in which the hearing request was filed in September 1976. There were no new hearing requests from Vermont pending in the Springfield, Massachusetts office. There is one Vermont case on remand from the Appeals Council.

(3) At present, a third detail of administrative law judges into Region I is underway. It is planned that these ALJs will hear just under 400 cases. This should cause further reductions in hearing delays in Vermont and in the rest of Region I.

John J. Sackett
JOHN J. SACKETT, Deputy Director
Bureau of Hearings and Appeals,
Social Security Administration,
Department of Health, Education,
and Welfare

Subscribed and sworn to before me
this 17th day of January, 1977.

Judith M. Urie
NOTARY PUBLIC, County of Arlington,
State of Virginia

My Commission Expires: 11/7/80

U.S.
Action 57

COPY

DEPT. OF VERMONT
FILED
FEB 22 4 02 PM '77
CLERK
BY zwz
DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Carroll Barnett; Harold McBrine, :
on behalf of themselves and all :
others similarly situated, :

and :

Raymond Grenier, Hattie McGivern, :
Harvey J. LaVigne and Sarah :
Sargent, :

Plaintiff Intervenors: :

v. :

David Mathews, Secretary of the :
Department of Health, Education :
and Welfare :

Civil Action

File No. 74-270

OPINION AND ORDER

Plaintiffs in this class action ^{1/} seek declaratory and injunctive relief to compel the Social Security Administration to expedite certain of its administrative processes. Each plaintiff has claimed disability benefits under the federal Supplemental Security Income ("SSI") program 42 U.S.C. §§ 1381-1381c, and has been denied such benefits at the initial administrative levels. Subsequent to denial, each has properly requested a hearing on the issue of disability. Plaintiffs allege that the delays between the dates when such hearings are requested and the dates when they are scheduled and actually transpire are unreasonably long, in contravention of 5 U.S.C. § 555(b), 42 U.S.C. § 1383(c)(2), and the fifth amendment to the United States Constitution.

In its opinion dated May 5, 1975, the Court found that it had mandamus jurisdiction to hear this action under

28 U.S.C. § 1361. We reaffirmed that determination in our opinion of January 13, 1976.^{2/} The parties have now filed cross-motions for summary judgment and an agreed stipulation of facts. It appears that there is no genuine issue as to any material fact and, therefore, a determination of the merits on the parties' motions for summary judgment is appropriate. Fed. R. Civ. P. 56(c).

Briefly stated, the facts are as follows:^{3/}

After a claim for SSI benefits has been denied at the initial stages of the administrative process, a claimant has a right to request a hearing before an official of the Bureau of Hearings and Appeals. 20 C.F.R. § 416.1425. When a local Social Security district office receives such a request, it will send the file on that case to the Development Center in Boston for further development--i.e., gathering medical reports and organization of the file. A study made by the Director of the Development Center indicated that at the time of the study the median time that a file remained at the Development Center was 31 days. Times, however, ranged from 5 to 140 days. Further, it is a policy guideline of the Development Center that a case should not remain at the Center longer than 45 days. After development, a case is forwarded to the Manchester office of the Bureau of Hearings and Appeals. As of March 1976, a case would wait 3 to 4 months in the Manchester office before it would be assigned to a hearing officer. During this time no action would be taken with respect to the case. Cases are then assigned to individual hearing officers as their case loads allow. Thereafter a hearing date is set in accordance with the schedule of the individual hearing officer.

As of March 1976, there was typically a 6 to 7 month lag between request for a hearing and the assignment of the case to a hearing officer, who would then hold a hearing as soon as his schedule permitted.

The delays between request and hearing dates experienced by those claimants individually named in the parties' stipulations of fact ranged from 3 to 13 months. Data comparing request dates with hearing dates for the 100 hearings that had been held as of January 23, 1976, discloses delays ranging from 1 month to 11 months. The defendant has supplied the Court with more current data that, although not readily comparable with the foregoing statistics, appears to indicate a continuing progress toward alleviating such delays as exist. Even so, it is apparent that the defendant has not yet met the plaintiffs' demand for relief that all SSI appeals be heard within 90 days of request.

The defendant stated that it was his objective to hold all SSI disability hearings within 100 days of the request date by September 30, 1976, and to reduce the delay between request and hearing dates to 90 days by the end of 1977.^{4/} The defendant has since retreated from his position,^{5/} and now declines to predict when this objective will be met. At oral argument counsel for the defendant further retrenched by portraying the 90 day objective as an aspiration but not necessarily an attainable goal.

Before embarking upon a discussion of the merits it will be beneficial to recount briefly some aspects of both the cause of the delays and certain remedial measures that have been taken by the Social Security Administration.^{6/}

A claim may be made for SSI benefits only ("straight SSI claim"), or for concurrent SSI and Title II,

42 U.S.C. §§ 401 et seq., benefits ("concurrent claim").

As a rule, concurrent claims have been subject to longer delays than straight SSI claims because under prior law there existed a separate category of hearing officers who could hear only straight SSI cases, enabling expedited handling of those cases due to a lighter work load for that particular type of hearing officer. Thus, this functional difference in hearing officers is cited as a cause of backlogs and ensuing delays in concurrent claims.

Other causes of delay that have been specified by the defendant are (1) the rapidly increasing number of claims, (2) difficulties encountered in appointing additional hearing officers and (3) the nature of the disability inquiry itself. The defendant has taken some steps to remedy the situation. These include increasing staffing and using improved equipment and techniques to increase productivity. In addition, the defendant has temporarily assigned extra hearing officers to high demand locales.^{8/}

Congress has also focused considerable attention on this problem, and as a result of that attention passed certain limited remedial legislation. Now Pub. L. No. 94-202 (Jan. 2, 1976) permits the class of hearing officers that was formerly limited exclusively to hearing straight SSI cases, to hear concurrent and Title II cases as well as straight SSI cases. In adopting this approach, Congress bypassed proposed legislation which would have set time limits for a hearing decision.

The plaintiffs' position is simply that the delays experienced by them in attempting to be heard contravene certain statutory requirements and deny them of the due process of law to which they are entitled under the fifth amendment.

The section of the Social Security Act upon which plaintiffs rely reads in pertinent part:

(1) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for payment under this title. The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this title with respect to eligibility of such individual for benefits. . . .

(2) Determination on the basis of such hearing, except to the extent that the matter in disagreement involves a disability (within the meaning of . . . [42 U.S.C. § 1382c(a)(3)]), shall be made within ninety days after the individual requests the hearing as provided in paragraph (1).

42 U.S.C. § 1383(c), as amended, Pub. L. No. 94-202 (Jan. 2, 1976) (emphasis supplied). The Administrative Procedure Act further provides:

With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.

5 U.S.C. § 555(b). The Administrative Procedure Act also mandates that the reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

With regard to the statutory claims, the parties, in their memoranda, indicate that the essence of this case is the determination of a reasonable time span within which to hold an SSI disability hearing after it has been requested.

The parties differ in that the plaintiffs claim 90 days to be a reasonable period, while the defendant alleges that it is within his discretion to determine what is reasonable. That is, the defendant claims that recent legislative remedial measures and administrative initiatives directed at reducing delays make reasonable whatever delays that may now exist.

While the statutes quoted above state that there shall be "reasonable notice and opportunity for a hearing" and that agency matters shall be concluded "within a reasonable time," nowhere is "reasonable time" for the scheduling of an SSI disability hearing expressly defined. With that in mind, we proceed to a more detailed discussion of the defendant's arguments.

The defendant has initially raised the question of whether the instant case presents a justiciable issue, and argues that the Court should defer to legislative and administrative resolution of the problem. In support of this proposition, defendant cites FCC v. Pottsville Broadcasting Co., 309 U.S. 130 (1940). That Congress is a primary agent in correcting agency problems is not in doubt, however, the courts are also authorized to oversee agency processes through mandamus jurisdiction, 28 U.S.C. § 1361.^{9/} More particularly, Congress has specifically invested the courts with the authority and the duty to prevent unreasonable delay in an agency's processes. 5 U.S.C. § 706(1). When an agency acts outside the scope of its statutory authority, such as by delaying a hearing for an unreasonable length of time, then the courts have the authority and the duty to act to remedy the situation. See FCC v. Pottsville Broadcasting Co.,

supra, 309 U.S. at 144-45; Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 861-62 (4th Cir. 1961), and cases cited therein.

Concerning the violation of 42 U.S.C. § 1383(c) (1) defendant argues that the absence of an express time limitation on the decision process in disability cases demonstrates that no time limit should be imposed. Although Congress did not see fit to apply the 90 day request to decision time limit of 42 U.S.C. § 1383(c) (2) to disability cases, this does not completely gainsay the concern of Congress that hearings be held within a reasonable time. Concern with unreasonable delays is clearly evidenced by the enactment of Pub. L. No. 94-202, which is intended to alleviate the delay problem, and by the Congressional discussion that lead to that act. See, e.g. Hearings on Delays in Social Security Appeals Before the Subcommittee on Social Security of the House Committee on Ways and Means, 94th Cong., 1st Sess. (1975). More importantly, the lack of an express time limit cannot alter the statutory requirement that an applicant be afforded a reasonable opportunity for a hearing. The lack of a maximum time limit does not mean that any delay is reasonable. In fact, the various statements of the parties indicate that 90 days from request to hearing is a reasonable time. Indeed, the specific 90 day request to decision time limit in nondisability cases, 42 U.S.C. § 1383 (c) (2), gives some indication that 90 days between request and hearing is not unreasonable for disability claims, despite the relatively more complex nature of the latter. Upon consideration of these factors and the evidence in the record, the Court holds that 90 days is the maximum reasonable period between request date and hearing date in an SSI

disability case.

In conjunction with the previous argument the defendant suggests that the total SSI statutory scheme evidences a "clear rejection of any suggestion that benefits should be paid because a time limit has been exceeded." The fact that Congress did not choose to employ predetermination payment of benefits as a tool to prevent undue delays, however, does not necessarily foreclose the use of that tool by the Court should it be deemed necessary. See Like v. Carter, 448 F.2d 798 (8th Cir. 1971), cert. denied, 405 U.S. 1045 (1972); White v. Mathews, 1A CCH Unempl. Ins. Rep. ¶ 14,869 (D. Conn. Sept. 29, 1976).

Defendant also contends that Congress' consideration of the problem of delays in the administrative appeals process and its enactment of Pub. L. No. 94-202 as the "most effective action that can be taken immediately to help reduce the enormous backlog of social security appeals cases now [sic] pending within the Social Security Administration," H.R. Rep. No. 679, 94th Cong., 1st Sess. 1 (1975), forecloses judicial action. The fact that Congress chose to enact Pub. L. No. 94-202, as the most reasonable immediate action on what it recognized as an "enormous" problem, does not make the delays reasonable. Rather, contrary to the Secretary's position, such action emphasizes the existence of the delays as a problem demanding considerable palliative measures. Again, the action of Congress to remedy this problem does not affect an applicant's statutory entitlement to a "reasonable opportunity" for a hearing.

Defendant's argument with regard to 5 U.S.C. § 555 (b) is essentially that the large SSI backlog, caused by a burgeoning caseload and limited staff, makes reasonable

delays that under other circumstances might be unreasonable. Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972); F.T.C. v. J. Weingarten, Inc., 336 F.2d 687 (5th Cir. 1964), cert. denied, 380 U.S. 908 (1965); Deering-Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961). These cases, which appear to support defendant's position, deal with administrative delays in a commercial setting. In such circumstances the problems of the overburdening caseload of an agency perhaps may be a weightier factor than in the area of welfare. But viewed another way, the strain on the agency processes could be alleviated by appropriate action, possibly in terms of expanded staff and/or funding. What in substance amounts to a claim of increased costs cannot provide justification for the Social Security Administration's violating statutory mandates. See Goldberg v. Kelly, 397 U.S. 254, 266 (1970); Like v. Carter, 448 F.2d 798, 803 (8th Cir. 1971); White v. Mathews, 1A CCH Unempl. Ins. Rep. ¶ 14869 at 2499-358 (D. Conn. Sept. 29, 1976); Blankenship v. Mathews, Civil No. C75-0185 L(A) at 8 (W.D. Ky. May 6, 1976).

The Court concludes that the plaintiffs have been subjected to unreasonable delays encountered between the time when a hearing is requested and the time when the hearing occurs and that it is within the Court's power to grant plaintiffs such relief as is appropriate.

We have not found it necessary to rule upon the constitutional claim, because we have determined that the plaintiffs are entitled to relief based solely on statutory grounds. However, two district courts have ruled upon issues that are for all practical purposes identical to the issue at hand, and in each case the plaintiffs were granted relief on constitutional grounds. White v. Mathews, 1A

CCH Unempl. Ins. Rep. ¶ 14869 (D. Conn. Sept. 29, 1976); Blankenship v. Mathews, Civil No. C75-0185 L(A) (W.D. Ky. May 6, 1976). Although we have no occasion to rule on the constitutional question we, nonetheless, agree with the reasoning of those two cases.

Having determined that plaintiffs are entitled to relief, the Court must fashion the appropriate remedy. In this regard, the orders in Blankenship and White provide some guidance. The Blankenship court, to remedy delays in both SSI and Social Security hearings processes, ordered that all hearings after a specific date be held within 90 days after an applicant requests a hearing. The defendant was further ordered to provide the Court with certain data to facilitate the monitoring of compliance. In White, the Court, to remedy delays in hearings on Social Security disability benefits, ordered a stepped reduction in delays down to a maximum period of 120 days between request date and decision date. If decision in a particular case was delayed beyond the ordered maximum period, then the applicant became entitled to benefits until such time as an unfavorable decision was rendered.

The orders in these cases buttress the Court's own opinion that 90 days between request for a hearing and the scheduling and holding of that hearing is a reasonable time in light of all the circumstances.

Accordingly, within the District of Vermont the defendant, on or before July 1, 1977, shall have reduced the maximum delay between the proper filing of a petition for a hearing before an administrative law judge and the

scheduling and holding of such hearing to 120 days, and by December 31, 1977, the defendant shall have further reduced such maximum delay to 90 days. Any applicant who, on or after July 1, 1977 or January 1, 1978 has pending an application concerning which a hearing has not been scheduled and heard within the appropriate maximum times then in effect as hereby established, shall be paid nonrefundable benefits as though favorable action had been taken on his or her claim. Such benefits shall terminate upon a subsequent unfavorable result at hearing. The maximum time limit in any particular case shall be extended by such periods of delay as are caused directly by a petitioner's own failure to provide essential information for adjudication or are otherwise caused directly by a petitioner. Within 30 days the parties will agree upon and submit to the Court a proposed order suitable to accomplish the purposes of this judgment.

Dated at Burlington in the District of Vermont,
this 22nd day of February, 1977.


Albert W. Coffrin
District Judge

FOOTNOTES

- 1/ In its opinion, dated January 13, 1976, the Court certified "plaintiff's class to consist of all present and future applicants for SSI disability benefits whose initial claims are denied on a finding that no disability exists and who subsequently request a reconsideration hearing."
- 2/ The Court's opinion as to the existence of jurisdiction over this matter need no longer be based solely on mandamus jurisdiction in light of a recent amendment to 28 U.S.C. § 1331(a). Pub. L. No. 94-574 (Oct. 21, 1976).
- 3/ Also see the facts and discussion in White v. Mathews, 1A CCH Unempl. Ins. Rep. ¶ 14,869 (D. Conn. Sept. 29, 1976). That litigation involved the same issue with which we are concerned in this case, and the opinion therein deals with some factual aspects of the issue in greater detail than does this opinion. White is of particular relevance because Connecticut is located within the same Social Security administrative region as is Vermont.
- 4/ See defendant's memorandum filed October 1, 1976.
- 5/ Affidavit of Jan J. Saggett, Deputy Director of the Bureau of Hearings and Appeals (Sept. 15, 1976).
- 6/ See White v. Mathews, 1A CCH Unempl. Ins. Rep. ¶ 14,869 (D. Conn. Sept. 29, 1976) for a similar discussion.
- 7/ Affidavit of Jan J. Saggett (July 15, 1976).
- 8/ Id.; Affidavit of Jan J. Saggett (January 17, 1977).
- 9/ Cf. this Court's opinions dated May 5, 1975 and January 13, 1976; see also Pub. L. No. 94-574 (Oct. 21, 1976).
- 10/ In Dandridge v. Williams, 397 U.S. 471 (1970) the Supreme Court noted the substantial differences between business and welfare contexts, but nonetheless held that these differences did not require differing constitutional standards. The Court stated:

The administration of public welfare assistance, by contrast [to commercial situations], involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases [commercial cases defining constitutional standard] and this one, but we can find no basis for applying a different constitutional standard.

Id. at 485. Here, like Dandridge, the standard, "reasonableness," is the same in both settings, however, in determining

what is reasonable in a particular situation this Court must recognize that cases, such as this one, which concern public assistance programs do involve basic human needs. Thus, in the determination of "reasonableness," what may be a significant factor in a commercial setting may have less weight when balanced against such need.

COPY

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED
APR 14 11 56 AM '77
CLERK
DEPUTY CLERK

CARROLL BARNETT; HAROLD McBRIDE,
on behalf of themselves and all
others similarly situated)

RAYMOND GRENIER, H/ TIE MCGIVERN,
HARVEY J. LAVIGNE and SARAH
SARGENT,)

Plaintiff-Intervenors)

Civil No. 74-270

v.)

JOSEPH A. CALIFANO, JR.,
Secretary of the Department of
Health, Education & Welfare)

Defendant)

JUDGMENT

This cause having come on for hearing on the parties cross-motions for summary judgment, and after consideration of the Agreed Stipulation of Facts, legal memoranda, and oral argument presented by the parties on November 23, 1976 and in accordance with the Opinion of this court dated February 22, 1977, it is ordered that judgment be entered as follows:

IT IS HEREBY ADJUDGED that defendant's failure to provide a prompt administrative hearing to claimants for Supplemental Security Income benefits on account of disability pursuant to Title XVI of the Social Security Act (and SSI claimants who concurrently claim Title II Disability Insurance Benefits) residing in the District of Vermont who request such a hearing before an administrative law judge conflicts with the provisions of the Social Security Act, 42 U.S.C. § 405 and § 1383(c)(3), and the Administrative Procedure Act, 5 U.S.C. § 555(b).

IT IS FURTHER ORDERED AND ADJUDGED THAT:

(1) Defendant Joseph Califano, his agents, employees, successors or assigns, is enjoined, ordered, and directed to conduct administrative law judge hearings requested pursuant to Section 1361(c) of the Social Security Act, 42 U.S.C. § 1383(c), by residents of the State of Vermont claiming Title XVI SSI benefits on account of disability or concurrent SSI benefits and Title II Social Security Disability Insurance Benefits within the following time periods:

(a) With respect to requests for hearing made by a Vermont claimant pursuant to 20 C.F.R. § 416.1425, within 120 days of July 1, 1977;

(b) With respect to requests by Vermont claimants pursuant to 20 C.F.R. § 416.1425 made on or after July 1, 1977 and before December 31, 1977, within 120 days of the requests;

(c) With respect to requests made on or after December 31, 1977 by Vermont claimants pursuant to 20 C.F.R. § 416.1425, the hearing shall be held within 90 days.

(d) In computing the time periods set out in sub-paragraphs (a), (b) and (c), the time period shall commence with the date of receipt by defendant or his agent or employee of a formal written request for hearing filed pursuant to 20 C.F.R. § 416.1427 and shall end with the earlier of the date of hearing or the end of the 120th or 90th day, as applicable, following defendant's receipt of the written hearing request. In the event

that the last day of the periods enumerated in sub-paragraphs (a), (b) and (c) falls upon a Saturday, Sunday or legal holiday as defined in Rule 6(a) of the Federal Rules of Civil Procedure, the enumerated periods shall run until the end of the next day which is not a Saturday, Sunday or legal holiday. The remaining exceptions with respect to time periods are set out in paragraph (3)

(2) Defendant is ordered to deem those claimants who failed to receive their hearing within the maximum periods expressed in paragraph (1) to be considered disabled under the criteria of the Social Security Act and eligible to such SSI (and current Title II disability insurance) benefits as they would be eligible for if found to be disabled and if they are otherwise eligible based on the SSI income and resources criteria of the Social Security Act. Defendant is ordered to pay prospective non-refundable benefits to such claimants. In these instances, the eligibility shall be the first month after the month in which the maximum time period is exceeded and payment shall be made that month; the last month of eligibility shall be the month in which a written decision by the administrative law judge is issued which denies the claim. Nothing in this judgment shall be construed to require the payment of SSI benefits retroactive to the date of application for benefits (or Title II benefits retroactive to the date of alleged disability onset).

(3) Exceptions to the maximum time period set out in paragraph (1) occur in those cases in which:

(a) the claimant or his representative causes a delay by his failure to provide

information essential for adjudication;

(b) the claimant or his representative request a delay;

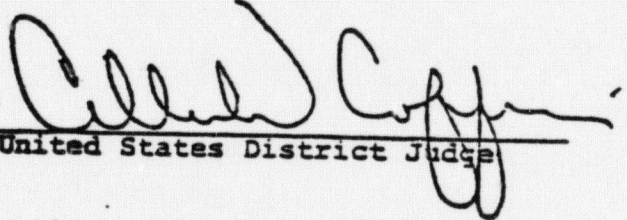
(c) the claimant or his representative fails to appear for a scheduled hearing;

(d) other action or omission directly attributable to the claimant or his representative.

(4) Benefits paid pursuant to this order shall be suspended after the time limits have been exceeded if the claimant refuses to cooperate in attending a scheduled hearing or in going to a consultive examination as deemed necessary by the administrative law judge or in obtaining any other necessary evidence.

(5) This decree shall be binding upon the Secretary of Health, Education & Welfare with respect to adjudicated hearings within the State of Vermont.

Dated at Burlington, in the District of Vermont, this
12th day of April, 1977.


United States District Judge

COPY

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

JUL 11 11 42 AM

CLERK BY *[Signature]*
DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Carroll Barnett; Harold McBrine, :
on behalf of themselves and all :
others similarly situated, :

and :

Civil Action

Raymond Grenier, Hattie McGivern, :
Harvey J. LaVigne and Sarah :
Sargent, :

File No. 74-270

Plaintiff Intervenor :
:

v. :

Joseph A. Califano, Jr., :
Secretary of the Department of :
Health, Education and Welfare :

OPINION AND ORDER

On February 22, 1977 this Court issued an opinion and order directing defendant Secretary of Health, Education and Welfare to expedite certain administrative hearing processes concerning claims for disability benefits under the federal Supplemental Security Income Program, 42 U.S.C. §§ 1381-1381c. The Court mandated a stepped decrease in the maximum length of time permissible before an applicant for benefits receives the required administrative hearing. The Court further ordered that, should the Secretary fail to meet a court-ordered hearing deadline for any individual applicant, that applicant should be paid nonrefundable benefits as though favorable action had been taken on his claim. The judgment order issued on April 14, 1977.

Pursuant to Fed. R. Civ. P. 59(e), defendant filed a timely motion to alter or amend the judgment on April 25,

1977. Defendant's motion seeks the deletion of the provision ordering nonrefundable benefits to those with respect to whom the Secretary fails to meet the Court's timetable. As an alternative, defendant filed a motion for a partial stay as to that portion of the judgment. Plaintiffs in an unrelated motion under Fed. R. Civ. P. 60(b)(6) request relief from the judgment order in that the Court add an additional ground for jurisdiction over this cause.

Jurisdiction

In its opinion dated May 5, 1975 the Court found that it had mandamus jurisdiction to hear this action under 28 U.S.C. § 1361. In an opinion dated January 13, 1976 we reaffirmed our jurisdictional decision, after that decision had been questioned by the parties in light of the then recently decided Weinberger v. Salfi, 422 U.S. 749 (1975).^{1/} At that point the jurisdictional issue appeared to be closed. Plaintiffs now call the Court's attention to Mathews v. Eldridge, 424 U.S. 319 (1976), which was decided on February 24, 1976, after the apparent final resolution of the jurisdictional issue.

In light of the history of the jurisdictional issue in this case, we think that at worst plaintiffs' failure to mention Mathews v. Eldridge at an earlier stage of the litigation can be attributed to excusable neglect. In any event, the Court deems it equitable to consider plaintiffs' motion at this time in order to provide the parties with the fullest possible review of what remains an important issue. We conclude that plaintiffs' motion, made approximately one

month after final judgment, is appropriate for consideration under both Fed. R. Civ. P. 60(b)(1) and 60(b)(6).

We now proceed to the merits of the jurisdictional question. Plaintiffs claim that an additional ground for jurisdiction in this case exists under 42 U.S.C. § 405(g) as interpreted in Mathews v. Eldridge, 424 U.S. 319, 326-32 (1976). Eldridge involved an individual who was receiving Social Security disability benefit payments and whose benefits were terminated. After employing various administrative procedures, he challenged the constitutional validity of the administrative assessment procedures, rather than pursue an administrative reconsideration to which he was entitled. Eldridge upheld jurisdiction over the action in the face of claims of failure to exhaust administrative remedies. In doing so the Court explained the jurisdictional holding in Weinberger v. Salfi, 422 U.S. 749 (1975), which "held that 42 U.S.C. § 405(h) precludes federal-question jurisdiction in an action challenging denial of claimed benefits," 424 U.S. at 327, making 42 U.S.C. § 405(g) ^{2/} the exclusive avenue for such reviews. As to jurisdiction under 42 U.S.C. § 405(g),

Mathews teaches:

Implicit in Salfi, however, is the principle that this condition [existence of a final decision after a hearing] consists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no "decision" of any type. And some decision by the Secretary is clearly required by the statute.

424 U.S. at 328.

....."

This case appears to parallel Eldridge as to the nonwaivable element. Plaintiffs, obviously, have made a claim for benefits. Like the plaintiff in Eldridge, 424 U.S. at 329, plaintiffs here made application to the state agency charged with making disability determinations both initially and on reconsideration. The determination of the agency would be accepted by the Social Security Administration absent a full administrative hearing. In fact, plaintiffs' position here is even stronger because they sought an administrative hearing from the Social Security Administration action not taken in Eldridge. See id. at 328. Plaintiffs' claim that the hearing delays are unconstitutional and contrary to the statute could have been made to the Secretary, but as in Eldridge, id. at 329-30, this is the type of claim that one cannot realistically expect the Secretary to consider. Thus, the reasoning in Eldridge suggests that the plaintiffs here have satisfied the nonwaivable element.

This case also appears to parallel Eldridge as to the waivable element. In Eldridge it was held that the "claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment [on exhaustion or "finality"] is inappropriate." Id. at 330. Here the statutory and "constitutional challenge is entirely collateral to [the] substantive claim of entitlement." Id. Full relief cannot be obtained by awaiting the Secretary's final determination, even if plaintiffs are awarded retroactive benefits. Id. at 331. In fact, a final determination would likely moot any individual plaintiff's claim.

In sum, the jurisdictional issue in this case closely parallels the same issue in Eldridge and for that reason we hold that jurisdiction exists under 42 U.S.C. § 405(g), as well as under 28 U.S.C. § 1361.

Amendment Concerning Nonrefundable Benefits

The defendant's first ground for objection to the provision regarding the payment of nonrefundable benefits is that such an order is contrary to the Social Security Act. In support of this argument, defendant cites a provision of the Act which espouses the purpose of assuring that benefits only be provided to eligible individuals, 42 U.S.C. § 1383(e)(1)(B), and a provision for the recovery of overpayments, 42 U.S.C. § 1383(b). Of course, the Act evinces a purpose of confining the payment of benefits only to eligible persons; to contend otherwise would be ludicrous. But the Act itself really does not speak to the issue at hand. Thus, we do not think that the explicit language and purposes of this Act provide the proper perspective from which to examine the questioned provision. Rather, we regard the problem as one of determining the extent of the Court's equitable powers.

The parties argue the issue in terms of sovereign immunity. In particular, they take opposing positions as to whether the relief in this case falls within a recognized exception to the doctrine of sovereign immunity. This exception is: "[W]here the [federal] officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949); accord Dugan v. Rank, 372 U.S. 609, 621 (1963). The Court in Larson qualified this statement by stating that, even if

the exception were to apply, sovereign immunity would still be a bar "if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." 337 U.S. at 691 n.11. The plaintiffs rely on the exception while the defendant relies on the qualification to the exception. Helpful discussions of the doctrine of sovereign immunity and the qualified exception thereto may be found in Schlafly v. Volpe, 495 F.2d 273, 277-80 (7th Cir. 1974) (relief not barred by Larson's footnote 11 unless relief sought would work an intolerable burden on governmental functions, outweighing any private harm), and Knight v. New York, 443 F.2d 415, 419-21 (2d Cir. 1971) (adhering to a literal reading of Larson's footnote 11).

Initially, we note that the general equitable relief granted in this case is not barred by sovereign immunity. Sovereign immunity was explicitly waived in an action under the Administrative Procedure Act ("A.P.A.") for nonmonetary relief by the 1976 amendment to 5 U.S.C. § 702. Even prior to that time the Second Circuit had interpreted the A.P.A. as a waiver of sovereign immunity for those claims coming within its scope. Kletschka v. Driver, 411 F.2d 436, 445 (2d Cir. 1969).

As to the precise issue of the legitimacy of the Court's nonrefundable benefits provision, we deem the discussion of sovereign immunity to be only of marginal utility. Rather, in keeping with the view that the question

one of the equitable powers of the Court, we would frame the issue as follows: May the Court as an adjunct to its proper grant of equitable relief order auxiliary relief which has the potential for requiring the disposition of sovereign property, despite the traditional immunity from relief which "would expend itself on the public treasury or domain," Dugan v. Rank, 372 U.S. 609, 620 (1963); Land v. Dollar, 330 U.S. 731, 738 (1947)?

In this regard, we refer to the often quoted^{3/} language of Mr. Justice Douglas in Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944).

"An appeal to the equity jurisdiction conferred on the federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." Meredith v. Winter Haven, 320 U.S. 228, 235. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Admittedly, the nonrefundable benefits provision has the potential for expending itself on the public treasury. But this is no more onerous than the underlying injunctive relief mandating expedited hearings, compliance with which presumably will require an expenditure of public funds.^{4/} See Schlaflly v. Volpe, 495 F.2d 273, 280 (7th Cir. 1974); Shannon v. HUD, 387 F. Supp. 5, 8 (E.D. Pa. 1974). Moreover, plaintiffs have not attacked the public treasury for they have not sued for the institution of the Court's nonrefundable benefits rule. Rather that remedy is judicially fashioned to assure compliance with the Court's underlying substantive order. Furthermore, as plaintiffs point out, if the defendant

complies with the Court's order the challenged provision will never have effect. Thus, when viewed as an adjunct to proper equitable relief, the provision in question is proper even though both it and the underlying relief may regrettably require the expenditure of public funds.

Finally, we consider the balancing suggested in Hecht Co. v. Bowles, supra, between public interest and private needs. With regard to the private needs, the apparent financial need of the potentially eligible plaintiffs tips the balance in their favor. Public interests pull in both directions. There is a public interest in expedited hearings so that the public will be properly served; but, of course, the public has the countervailing interest in avoiding payments to ineligible.

We conclude that on balance the Court's creation of the potential for the payment of nonrefundable benefits to those who do not receive timely hearings is an appropriate adjunct to the other equitable relief granted in this case.

The Stay

As the Court has refused to grant defendant's motion to alter or amend the judgment we must decide whether to grant defendant's motion for a partial stay of the judgment. Again focusing on the nonrefundable benefits provision, defendant urges us to stay its effect under either Rule 62(c) or 62(d) of the Federal Rules of Civil Procedure. In our view defendant seeks the stay of an injunction rather than a stay of a money judgment. Thus, we consider the issuance of a stay in this case to be controlled by Rule 62(c).

There are four generally recognized factors that are employed in deciding a Rule 62(c) motion. They are: (1) the likelihood that petitioner will prevail on the merits of the appeal, (2) irreparable injury to the petitioner unless the stay is granted, (3) no substantial harm to other interested persons, and (4) no harm to the public interest. Belcher v. Birmingham Trust National Bank, 395 F.2d 685 (5th Cir. 1968); Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958); 7 Moore's Federal Practice ¶ 62.05, at 62-25 (2d ed. 1975). This test received at least the tacit approval of the Supreme Court by the summary affirmance in North Central Truck Lines, Inc. v. United States, 384 F. Supp. 1188 (W.D. Mo. 1974) (three-judge court), aff'd mem., 420 U.S. 901 (1975).

As to the first factor, quite obviously the Court thinks that defendant will prevail on appeal neither on the substantive issues of this case nor as to the propriety of the relief granted. However, despite the Court's opinion, we recognize that our decision on at least the relief granted is open to some question. Therefore, the "likelihood-of-success factor" may even weigh slightly in favor of a stay or is at least neutral. Secondly, there may be irreparable injury to the defendant if a stay were not granted. If the decision were reversed on appeal either as to relief or substantively the defendant as a practical matter likely will not be able to recover a great part of the benefits paid out to ineligible persons under the Court's order. Additionally the defendant suggests that certain administrative costs associated with compliance with the provision would inevitably be lost. The third factor—harm to other interested persons—

arises here in that some persons who will ultimately qualify for benefits will not receive such benefits in as timely a manner as they would under the Court's order. They would, however, receive any benefits for which they are eligible retroactively to the month of application. 20 C.F.R. § 416.501. That is not to say that the potential payments of retroactive benefits provides full relief to the plaintiff but it would mitigate any harm caused by a stay. All persons who request administrative hearings will be prejudiced if the hearings are delayed as a result of the Court's staying the nonrefundable benefits provision which is an incentive to expedition. However, the Court has no reason to doubt the defendant's good faith in complying with its order either with or without the incentive of the questioned provision. The final factor--the public interest--would better be served, we think, by the grant of a stay. The public interest undoubtedly lies in the conservation of public dollars, particularly where some potential expenditure would benefit those who are not eligible for Supplemental Security Income benefits. Although there is a public interest in assuring expedited administrative hearings, there is, as we noted earlier, no indication that defendant will not act in good faith in expediting such hearings pursuant to the Court's order.

In Edelman v. Jordan, 414 U.S. 1301 (1973), Mr. Justice Rehnquist stayed an order of the district court to pay certain retroactive benefits to recipients of Aid to the Aged, Blind and Disabled. His reasoning relied on the fact that the federal defendant, should he prevail, would in all

likelihood not be able to recover benefits wrongly paid out under the district court's order. On the other hand, if plaintiff prevailed he would be able to collect all benefits due him. The similarity of the instant situation is apparent from our prior discussion.

In view of the foregoing, we think it prudent to stay the effect of the judgment order in this matter pending appeal insofar as it requires the payment of nonrefundable benefits to those who are not granted timely administrative hearings.

Accordingly, plaintiffs' motion regarding the addition of 42 U.S.C. § 405(g) as a basis for jurisdiction is granted; defendant's motion to alter or amend the judgment is denied; and defendant's motion for a partial stay of judgment pending disposition on appeal is granted. The judgment order in this matter will be stayed pending disposition on appeal only insofar as it requires the payment of nonrefundable disability benefits to those who do not receive timely administrative hearings under the Court's prior order.

It is so ORDERED.

Dated at Burlington in the District of Vermont,
this 11th day of July, 1977.


Albert W. Coffin
District Judge

.

FOOTNOTES

1/ In our opinion on the merits of this action we also made reference to the recently amended 28 U.S.C. § 1331(a), which now permits certain actions against federal officials without regard to the usual jurisdictional amount. Pub. L. No. 95-574, 90 Stat. 2721, § 2 (Oct. 21, 1976). We now expand upon that reference. This Court previously held that the amendment to 28 U.S.C. § 1331(a) may be applied retroactively to pending cases. Green v. Philbrook, 427 F. Supp. 834, 836 (D. Vt. 1977).

We are aware that Weinberger v. Salfi, 422 U.S. 749 (1975), interprets 42 U.S.C. § 405(h) to preclude "federal-question jurisdiction in an action challenging denial of claimed [Social Security] benefits," Mathews v. Eldridge, 424 U.S. 319, 327 (1976), and that this may preclude jurisdiction in an action such as the one at bar. We do think, however, that the present action is distinguishable from Salfi in that we do not characterize this suit as "challenging denial of claimed benefits" or as one "to recover" benefits, 42 U.S.C. § 405(h). See the opinion in this cause dated January 13, 1976 for a more detailed explanation of this rationale. Cf. Califano v. Sanders, 45 U.S.L.W. 4209, 4211 (U.S. Feb. 23, 1977) (recent discussion of Salfi and Eldridge reaffirming holding that § 1331 jurisdiction is barred by 42 U.S.C. § 405(h); possibility that suit questioning administrative procedures may not be one "to recover" benefits not discussed).

However, because the Court has not received the benefit of focused adversary argument on this issue, we do not think it appropriate to rely upon 28 U.S.C. § 1331(a) as an additional jurisdictional ground and we do not do so.

2/ Section 405(g) in part provides:

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

3/ See SEC v. Geon Industries, Inc., 531 F.2d 39, 56 (2d Cir. 1976).

4/ Cf. Defendant's Memorandum in Support of Motion for Summary Judgment at 9 (filed Aug. 23, 1976) (past efforts to reduce hearing delays involved increasing staff and purchasing more sophisticated office machinery.)

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

AUG 30 3 23 PM '77

CLERK
BY

DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Carroll Barnett; Harold McBrine, :
on behalf of themselves and all :
others similarly situated, :

and :

Raymond Grenier, Hattie McGivern, :
Harvey J. LaVigne and Sarah :
Sargent, :

Plaintiff Intervenor :
:

v. :

Joseph A. Califano, Jr., :
Secretary of the Department of :
Health, Education and Welfare :

Civil Action

File No. 74-270

ORDER

Plaintiffs in this cause have moved the Court to vacate the partial stay of its judgment order filed on July 11, 1977, in light of the recent opinion of the United States Court of Appeals for the Second Circuit in White v. Mathews, No. 77-6015 (Decided July 18, 1977). White decided issues virtually identical to those in the instant case favorably to the plaintiffs including a provision that claimants who do not receive hearings within the time limits set by the Court would be paid benefits at the expiration of the time limit until a decision is rendered at the administrative hearing. The principal difference between the two cases with respect to the payment of benefits pending administrative hearing is that in White the Social Security Administration is entitled to full recoupment of the interim benefit payments if the administrative law judge rules against the claimant and in the present case the interim benefits are nonrefundable and not subject to recoupment.

Upon consideration of the plaintiffs' motion, the memoranda filed by the parties, and the arguments of counsel at the hearing held on August 29, 1977, it is ORDERED:

That plaintiffs' motion to vacate the partial stay of the judgment order be, and the same hereby is, granted and said stay is ~~vacated~~ with respect to the payment of disability benefits to those who do not receive timely administrative hearings under the Court's prior order except that such part of the judgment order that made the payment of such benefits "nonrefundable" shall continue to be stayed pending disposition of this matter on appeal.

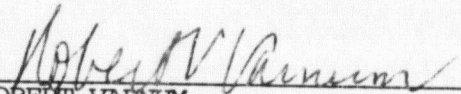
Dated at Burlington in the District of Vermont, this 30th day of August, 1977.


Albert W. Coffrin
District Judge

CERTIFICATE OF SERVICE

I certify that on April 13, 1978, reprinted copies of the joint appendix and exhibits to the appellant's brief in Barnett v. Califano, (2d Cir. No. 77-6166) were served by mailing them to:

Zander Rubin, Esq.
Vermont Legal Aid, Inc
55 Main Street
St. Johnsbury, Vermont 05819



ROBERT VARNUM